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IN THE

Supreme Court of the United States

_____ TERM, 1970

NO. 618

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 450, AFL-CIO, *Petitioner,*

v.

CONSTRUCTION EMPLOYERS' ASSOCIATION OF TEXAS, ET AL, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 450, AFL-CIO, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause.

OPINIONS BELOW

The Opinion of the United States District Court is reported at 301 F. Supp. 49; 71 LRRM 2869 (S.D. Texas). The Opinion of the United States Court of Appeals for the Fifth Circuit is unreported in the Federal Reporter but may be found at 74 LRRM 2460. Both Opinions are reproduced in the Appendix to this Petition.

JURISDICTION

This Court has jurisdiction in the instant case because the United States Court of Appeals for the Fifth Circuit "has erroneously decided an important question of federal law which has not been, but should be, settled by this Court." Rule 19 1.(b), Supreme Court Rules. Jurisdiction is also invoked under 28 U.S.C.A. 1254 (1).

The original complaint in this action was filed on July 11, 1966. (App. 203, et seq.)[1] On June 27, 1969, following a January 17, 1968, denial of Respondents' motion for summary judgment on the issue of liability, the questions of liability and damages were severed, and the issue of liability was ordered to be tried first. (App. 288-92).

The issue of liability was tried before the Honorable Reynaldo G. Garza, sitting without a jury, on April 14 and 15, 1969, and on July 10, 1969, the Court filed its Memorandum and Order of Dismissal, finding that the Petitioner, Operating Engineers, did not violate Section 8(b)(4)(D) of the Labor Management Relations Act. (App. 326-35).

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1. "App." refers to the printed Appendix filed September 9, 1969, by the Respondents. All emphasis in this brief has been added by the writer unless otherwise indicated.

Appeal was duly perfected and on June 4, 1970, the United States Court of Appeals for the Fifth Circuit, finding that the Operating Engineers had committed an unfair labor practice in violation of Section 8(b)(4)(D), reversed and remanded the case to the district court for a determination of damages.

No motion for rehearing was filed and none was necessary to give this Court jurisdiction. This petition is filed within the time allotted by 28 U.S.C.A. 2101(c) and Rule 22(3), Rules of the Supreme Court.

QUESTIONS PRESENTED

1. Is the existence of a genuine "jurisdictional dispute" under Section 8(b)(4)(D) of the Labor Management Relations Act, 29 U.S.C.A. §158(b)(4)(D), a prerequisite to a cause of acton based on Section 303(a) and (b) of the Act, 29 U.S.C.A. §187?

2. Does the assignment of work by an employer to a union for purely economic reasons, where the favored union is willing to do the work but never "claimed" it, would not have waged economic warfare to get it and in fact honored the picket line of the claiming union, constitute a genuine jurisdictional dispute?

3. Was the Engineers' picketing, under the findings of the Trial Court and the Fifth Circuit Court of Appeals and the undisputed facts, a violation of Section 8(b)(4)(D), compensable by damages under Section 303 of the Act?

STATUTORY AND PROCEDURAL RULES INVOLVED

The statutes involved are Section 8(b)(4)(D), Section 10(k) and Section 303 of the Labor Management Relations Act, 29 U.S.C.A. Sec. 151 et seq. The particular texts of these provisions are set forth in the Appendix to this Petition.

STATEMENT OF THE CASE

This action was brought by Respondents under Section 303 of the Act, 29 U.S.C.A. Sec. 187, alleging that Petitioner Union violated the Act by picketing gates of Respondent, Dow Chemical Company's Plant at Freeport, Texas, on March 23 and 24, 1960.

The Respondents are Dow Chemical Company, which operates two large industrial plants in Freeport, Texas, and ten companies that do construction and maintenance work or perform other related services at the Dow Plant. All but one of the ten contractor Respondents ("Contractors") are members of Respondents Construction Employers' Association ("Association") which represents its members in bargaining with various construction unions, including Petitioner, Operating Engineers Local 450 ("Engineers"). Petitioner, Operating Engineers Local 450, is a labor organization which represents a number of employees of Contractors and other construction industry employers that perform work at the Dow Plant. At all times relevant to this case the Association and Engineers have been parties to a collective bargaining agreement. It is significant that Ashley Heckham, against whom Petitioner's picket was directed, did not [illegible]

spondents in the institution and prosecution of this action. (App. 84-85).

Around March 19, 1966, Ashley-Hickham began certain maintenance and repair work on turbine generator unit No. 2, Power Plant No. 4, in Dow's Plant B. Ashley-Hickham undertook this work pursuant to a cost-plus subcontract between it and General Electric Company, and General Electric, in turn, had a cost-plus contract with "Dow" to do the job. This work required the use of a permanently installed overhead crane which is owned by "Dow". This crane is operable either from a cab or from the ground by a pendant control, a switch mechanism at the end of an electrical cable hanging from the crane.

At the time this work was to be performed, and for a few years prior thereto Ashley-Hickham recognized and had a labor contract with Millwrights Local Union No. 2232, and employed a number of employees who were members of, or represented by, that labor organization (Millwrights). (App. 308, 327-328). Ashley-Hickham, under orders from "Dow", directed the Millwrights, who were doing the maintenance work, to operate the crane from the ground using the pendant control. The contract of Ashley-Hickham with the Millwrights did not specifically provide that the Millwrights would operate the crane in question, but Ashley-Hickham had done similar jobs for Dow in the past in which Millwrights had been used to operate the pendant controlled crane. (App. 76, 308-09, 328).

At the time of the picketing complained of, Ashley-Hickham had no labor contract with Engineers and had no employees on its payroll who were members of or

represented by Local 450, which had jurisdiction in the area of the Dow Plants at Freeport." (App. 309).

Before and after Ashley-Hickham began its work, around March 19, 1966, representatives of the Engineers requested of representatives of Dow, General Electric and Ashley-Hickham that the operation of the crane in question be assigned to an Operating Engineer of Local 450. Ashley-Hickham refused to honor the Engineers' request, or negotiate further, and continued to have the Millwrights operate the crane.

Engineers then followed up with a request that Ashley-Hickham enter into a contract with Engineers (one of the provisions of which would provide for wages and working conditions and the operation of the overhead crane by Engineers). This request was refused, and on March 23, 1966, at approximately 7 A.M. Engineers established an organizational picket at Dow's Gate 38, which was then being used by employees of Ashley-Hickham and of some of the Association's members. (App. 92-93, 100-101, 113, 131-132, 155-157). The picketing was peaceful and the picket signs contained the following language:

"ASHLEY-HICKHAM
MAINT. & ENG. INC.
DOES NOT EMPLOY NOR
HAVE A CONTRACT WITH
LOCAL UNION 450
OPERATING ENGINEERS"

Union members who used the gate honored the picket line and did not report for work. *When the Millwrights, who had entered the plant before the picket line was established, learned of the picketing, they left the plant.*

The picketing continued until approximately 4 P.M. on March 23, 1966, and resumed at 7 A.M. on March 24, 1966. The picketing was discontinued at approximately 9:30 A.M. on March 24, 1966, voluntarily, and by the following day operations were again back to normal.

After the Millwrights left the job on March 23, *honoring the Engineers picket line*, their steward telephoned Jack O. Fountain, Business Representative of Millwrights Local Union 2232, and told him there was a picket up, and Fountain's response to this information amounted to an instruction to continue to honor the picket line. (App. 176). It is undisputed that the Millwrights at all times had knowledge of the picket line and continued to honor it. The following testimony shows undisputedly that the Millwrights were not claiming the work of operating the pendant crane:

> "Mr. Combs: I will ask you this: Did the Millwrights, either through you or anybody else, make a claim that the operation of those cranes in connection with that overhaul job was work that belonged to the Millwrights?
>
> Mr. Fountain: On this specific job, no, sir. We did not tell anybody, that I can recall, that definitely that was the work of the Millwrights."
>
> * * *
>
> "Mr. Combs: Did you ever say to Mr. Ashley that the Millwrights claim the work and that it belongs to Millwrights? And by that, I'm talking about the operation of the overhead crane.
>
> Mr. Fountain: Mr. Combs, let me answer this way: In discussion with Ashley, I would say at different times that we had figured out ways and arguments

that we might could argue that this work was Millwrights, yes, sir. *But truthfully, I don't think that he believed or that I believed that the work was actually the work of the Millwrights.*

The Court: Well, you were sure trying to find a way to claim that it was such, weren't you?

Mr. Fountain: *No, sir, I didn't place any claim on that work.*

The Court: Well, you told Mr. Ashley, 'We'll cross that Bridge when we get to it,' and you told him that you were looking for a way to claim it for the Millwrights.

Mr. Fountain: No, Sir, I said at many times in discussion with Mr. Ashley we had discussed different ways that we might could claim the work.

The Court: Oh, you might claim it?

Mr. Fountain: Yes, sir.

The Court: All right. You just want to add the word 'might'? Put 'might'.

Mr. Fountain: I put 'might' in there the first time, sir.

The Court: All right.

Mr. Combs: Did you ever make claim to it?

Mr. Fountain: You mean on this specific job?

Mr. Combs: Yes, sir.

Mr. Fountain: *I don't recall making claim to this specific job, not that I can recall, Mr. Combs.*

Mr. Combs: State whether or not you ever told Mr. Ashley that it was not your work and you were not claiming it?

Mr. Fountain: Confidentially, Mr. Ashley had been in the turbine business much longer than I had, and

he was always trying to figure more ways economically to operate and *he knew that the work wasn't any more—the millwrights' work on a turbine job—than it was on a cement plant.*

Mr. Burch: Excuse me. I want to object to the witness' statement as to what Mr. Ashley knew and ask that it be stricken from the record.

The Court: Sustained. It may be removed.

Mr. Combs: Well, Mr. Fountain, I would like to ask you this question: If you were not claiming the work, *why did your men do it?*

Mr. Fountain: *Because they were assigned the work. They were told to do the work.*

Mr. Combs: *Who told them to do the work?*

Mr. Fountain: *Mr. Ashley's supervision.*" (App. 173-175).

* * *

"Mr. Combs: You did not instruct them to go back through the picket line, did you?

Mr. Fountain: No, sir, not that I recall.

Mr. Combs: Now, if you had been claiming that work, would you have instructed them to go back through the picket?

Mr. Fountain: Yes, sir. *We do not honor jurisdictional pickets.*" (App. 176-177).

Mr. Combs: Mr. Fountain, did you have, you or your organization, have any dispute with the operating engineers, Local 450, about the work, their work that was being done on that turbine job?

Mr. Fountain: I did not discuss that turbine job specifically with the operating engineers, and I do not believe that I've discussed it with them since then.

Mr. Combs: *Well, did you have any dispute about who was entitled to do that work?*

Mr. Fountain: *Not with them on that case, no sir.*" (App. 177).

Mr. Cutshall, Section Superintendent of General Plant Services for "Dow", testified as follows:

"Q. Was this a cost-plus job?
A. Yes, sir.
Q. So whether or not operating engineers were used on this pendant crane in Unit Number 2 would have an economic bearing, would it not?
A. Yes.
Q. And that would primarily be a matter that affected your company more so even than the subcontractor?
A. Yes." (App. 51).

Mr. Ashley Hickham, former president of Ashley-Hickhan Maintenance Co. testified by deposition and stated:

"Q. Well, it made an economic difference to you, did it not, whether you would have to carry an extra man to do a job on that crane alone?
A. Well, if it were a firm contract, it would be economic to me. But if it was a cost-plus, it would be economic to the other side.
Q. Well, was that a cost-plus?
A. Well, I couldn't, to be honest with you, I don't remember. I would have to look it up for you. I don't know.
Q. Well, even if it was a firm contract, your contract would be based on the number of employees and the number of work hours that it was going to take to do the job, I mean, you had calculated on those facts?
A. Sure." (App. 83).

Upon the foregoing testimony the trial court found

> "There is no question that the failure to use an operating engineer on the crane in question was for economic reasons."

The trial Court further found that "the amendments to the Act of 1947, and especially Section 8(b)(4)(D) and 10(k) of the Act, were devised to prevent an employer from being caught in the middle of a genuine jurisdictional dispute between two groups of employees, union or not. The Taft-Hartley Act itself and the proceedings in Congress during its amendment in 1947 show clearly that the right of unions to picket was not to be lightly taken away because of the Act or its amendments."

The Trial Court then stated:

> "There is no evidence in this case that the Millwrights ever told Ashley-Hickham that if the Operating Engineers were given the job of operating the crane, they themselves would strike. In fact it is abundantly clear that the Millwrights honored the picket of the Operating Engineers."
>
> * * *
>
> "I find, therefore, that under the Act, the protection and claim for damages by an employer under Section 8(b)(4)(D) can only be resorted to in a genuine jurisdictional dispute where two sides of employees inform the employer that they will strike if the work is given to the other, or the employer is under contract to assign the work to a particular group."

On Appeal the United States Court of Appeals for the Fifth Circuit found that:

> "Since one reason for the Operating Engineers picketing was found to be to force Ashley-Hickham to reassign work held by the Millwrights to the Operating Engineers, such picketing is clearly proscribed by the words of section 8(b)(4)(D), which makes it an unfair labor practice for a union to picket or threaten to picket where an object is *inter alia*: 'forcing or requiring any employer to assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization . . .' Section 303 confers a course of action for damages arising from such an unfair labor practice."

The Court further found that the facts did not warrant the conclusion that the strike resulted from an ordinary, everyday, management-labor economic dispute which would not be within the scope of section 8(b)(4)(D).

The Court of Appeals reversed and remanded the case to the trial Court for trial on the issues of damages.

REASONS URGED FOR GRANTING THE WRIT

This Court is urged to grant certiorari in the instant case because the decision of the United States Court of Appeals for the Fifth Circuit involved the determination of an important question in the construction of Section 8(b)(4)(D) and Section 303(a) and (b) of the Labor Management Relations Act. The proper interpretation of the correlation of these sections of the Statute is of recurring importance in the national labor policy and this interpretation has not been, but should be, settled by this Court.

1. No case has ever squarely reached the issue as to whether the existence of a genuine "jurisdictional dispute"

under Section 8(b)(4)(D), where both unions are "claiming" the work, is a prerequisite to a cause of action based on Section 303 (a) and (b) of the Act. In *Longshoremen's Union v. Juneau Spruce Corp.*, 342 U.S. 857 (S.Ct. 1952) and *N.L.R.B. v. Radio Engineers Union*, 364 U.S. 573 (1961), the Supreme Court *indicated* that a true "jurisdictional dispute" must exist for a Section 303 violation, but this question was not relevant to the disposition of either case. Respondents have contended that if there is a "competing claims" rule that ever applies, it applies only in Section 10(k) proceedings for reasons peculiar to the nature of those proceedings and not to suits for damages under Section 303.

Section 303(a) is expressly based entirely on a violation of Section 8(b)(4)(D). Section 8(b)(4)(D) prohibits picketing for the purpose of "forcing or requiring any employer to assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization." A literal reading of the proscribed objective set out in Section 8(b)(4)(D) might leave the impression that the "in group" of employees need do nothing, and that a demand by the "out" group's union, backed up by pickets or threats, is an actionable transgression. Petitioner submits that the legislative history of this Act, and the recurring phrase "jurisdictional disputes" in all the cases leads to the conclusion that a genuine "jurisdictional dispute" is an essential element of a Section 8(b)(4)(D) violation.

2. If a "jurisdictional dispute" is a necessary prerequisite to a violation of Section 303, then is a mere acceptance of the work sufficient to show that a "dispute" exists under this law? Is it not necessary that there must be rival

unions *actively* competing for the work? Respondents contend that in damage actions under Section 303 the courts have repeatedly found violations under facts similar to those in this case. In support of their contention, Respondents (and the 5th Circuit Court of Appeals) cite *N.L.R.B. (Pochontas Steamship) v. ILA Local 1291*, 368 F.2d 102 (3rd Cir. 1966); *Carpenters v. Montag & Sons*, 335 F.2d 216 (9th Cir. 1964); *Plumbers, Local 761 v. Matt J. Zaich Construction Co.*, 418 F.2d 1054 (9th Cir. 1969), and *Juneau Spruce*, supra.

These cases are clearly distinguishable from the case at bar because in each of them there existed an open conflict between two unions. Further, in those cases the employer was a helpless victim caught in the middle of an argument that did not concern him at all and that he had not brought about by any act of his own.

The question not settled in either the case at bar or in any other case cited by Petitioner or Respondents is, specifically, what constitutes a sufficient dispute for a violation to occur. The District Court in the instant case held that there was no violation because the Millwrights did not seek to enforce their demand for the work. Even if, as Respondents contend, the District Court fell into error in requiring a threat to strike for a violation to exist, there must certainly be *something* to show conflict between the two unions, for disputes are never monolithic. Petitioner submits that the key to determining whether or not a violation of Section 8(b)(4)(D) has occurred is whether the employer has been caught in the dilemna contemplated by the statute through no fault of his own.

In overruling the District Court's Opinion in the instant case, it is submitted that the United States Court of Appeals for the Fifth Circuit misconstrued the intention of Congress in enacting this legislation. The act outlaws "jurisdictional disputes". A "jurisdictional dispute" arises where the employer has been placed in a situation where he finds it impossible to secure the benefits of stability, *not because he refuses to satisfy the unions, but because the situation is such that he cannot satisfy either of them.* It was not disputes between an employer and a union that Congress was attempting to outlaw by the passage of Section 8(b)(4)(D), but the cross-fire of an employer being caught between two competing unions. *Absent such cross-fire, the dispute is economic rather than jurisdictional.*

Petitioner submits that the case at bar is purely and simply a dispute between the employer and the Engineers and therefore not a "jurisdictional dispute" within the meaning of Section 8(b)(4)(D). To interpret Section 8(b)(4)(D) to mean that a violation of that section occurred under the facts in the case at bar would be to emasculate a union's lawful right to picket in a purely economic dispute and would allow an employer a Section 303 remedy in situations clearly unintended by Congress in the passage of this Act.

ARGUMENT

Petitioner submits that the legislative history and decisions of the Supreme Court amply demonstrates that a "jurisdictional dispute" is a necessary element for a violation of Section 303 of the Labor Management Relations Act.

The House Committee report out of the proposals out of which these sections came, recognized the necessity of enacting legislation to protect employers from being "the helpless victims of quarrels that do not concern them at all". See *H. R. Rep. No. 245, 80th Cong.* Senator Morse described the term "jurisdictional dispute" as one used loosely to describe a variety of situations having as their common ingredient a controversy between one or more labor unions. See *II Leg. Hist.* 951. Senator Taft described a jurisdictional dispute as one in which two unions compete for work on a particular job. See *II Leg. Hist. 1012.* The Supreme Court spoke of a jurisdictional dispute as "a dispute between two or more groups of employees over which is entitled to do certain work for an employer." See *NLRB v. Radio Engineers*, [illegible] U.S. 537, 81 S.Ct. 330, 47 LRRM 2332, (S.Ct. 1961).

The Congress in enacting Section 8(b)(4)(D) contemplated a situation wherein Union A and Union B quarrel over a piece of work. These quarrels, particularly in the construction industry, are frequent and widespread. Most of them are eventually resolved with the employer never even annoyed; others reach the temperature that incites Union A to attack. There is only the powerful weapon available—the picket—and thus the employer falls victim to a problem not his own. How can he avoid the horns of the dilemma? If he acquiesces to Union B he is struck by Union A; and if he caters to Union A he is struck by Union B. An 8(b)(4)(D) injunction is his only way out; and Section 303 is the salve for his injury. All this the Congress clearly intended.

Let us, however, modify our hypothesis and suggest this—that the employer, for reasons founded on profit

prefers to grant a particular plum to Union B, whose members gladly accept. They are perhaps not particularly excited about the work, never demanded it, and certainly would not have waged economic war to get it—but they will not reject a gift, so they do the work. Is this a "jurisdictional dispute"? Is it not obviously an *economic* dispute between Union A and the employer? With Union B quiet, there is only one horn to the dilemma, and the employer is neither helpless nor innocent. While Union B observes from ringside, Union A and the employer spar in the arena, negotiating and brandishing economic weapons to their heart's content. This is far removed from the former hypothesis, when the employer was the spectator unlawfully drawn into an inter-union fray. A battle between a union and an employer over *any* economic dispute, *including* assignment, *vel non*, of particular work, is not and never has been a situation within the scope of Section 8(b)(4)(D).

The legislative history of the Act, and all significant decisions in its interpretation, are replete with a Congressional purpose to preserve unto labor its basic right to strike and advertise its dispute. To illustrate, the Act in full context does not even purport to define strikes that are permissible, but rather defines and proscribes only those that are *not* permissible. For example, the Act prohibits strikes or picketing for the purpose of obtaining an illegal agreement (8(b)(4)(A)); for a secondary boycott (8(b)(4)(B)); for recognition where another union is certified (8(b)(4)(C)); for recognition where another union has been lawfully recognized (8(b)(7)(A)); or an election held within the preceding 12 months (8(b)(7)(B)); or when picketing continues for recognition beyond a reasonable time with no election petition filed (8(b)

(7)(C)). The seventh remaining prohibition is of course Section 8(b)(4)(D).

Respondents in the lower Courts relied heavily on *NLRB v. Radio Engineers Union*, 364 U.S. 573 (1961), apparently for the proposition that the concept of an underlying "dispute" as a prerequisite to a violation of §8(b)(4)(D) arose in connection with administrative work assignment proceedings under §10(k) and has no application to damage actions under §303. Petitioner would advance the proposition that the *Radio Engineers* case is of little or no value in the determination of the issues before this Court. The *Radio Engineers* case was actually a determination by the Supreme Court that the National Labor Relations Board was obligated to make an affirmative award of the work between the employees represented by two competing unions in the course of 10(k) procedure. A "dispute" clearly existed and the Court was only concerned with the *procedures* for determining who should eventually get the work, by the orderly processes of the Board in a 10(k) hearing.

The *CBS* case obviously does not stand for the proposition, as contended by Respondents, that the determination of a "jurisdictional dispute" is applicable only to the two-stage administrative procedure before the N.L.R.B. and not to court actions under §303. Petitioner has no quarrel with the fact that a union cannot establish, as a defense to an action for damages under §303, "that it is entitled to the work struck for on the basis of such factors as practice or custom." Indeed, in that situation a true "jurisdictional dispute" would exist because, as stated by the Court in the *CBS* case itself, the essence of a jurisdictional dispute is that there is "a dispute between two

or more groups of employees over which is entitled to do certain work for an employer." If a true "jurisdictional dispute" does exist, then there is *inter alia* a violation of §303. In the instant case the employer was not the helpless victim of a quarrel between two competing unions over a work assignment and therefore a true "jurisdictional dispute" does not exist.

Respondents also relied on *Longshoremen's Union v. Juneau Corp.*, 342 U.S. 857 (S.Ct. 1952), as being a case analogous to the one now before this Court. If it is necessary at all for Petitioner to distinguish *Juneau* from the case at hand, it is quite easily done. Respondents apparently cite *Juneau* for the proposition that, in deciding a 303(a) suit, the courts may not *rely* on administrative and judicial law interpreting Section 8(b)(4)(D). Petitioner would show that *Juneau* merely holds the proposition that a previous finding of a violation of Section 8(b)(4)(D), by the National Labor Relations Board, is not a prerequisite to a *finding* of a violation of Section 303(a), in a district court action, a proposition which Petitioner has no disagreement with whatsoever. Additionally, *Juneau*, far from being in conflict with the arguments advanced by Petitioner herein, in our opinion tends to support them.

In *Juneau*, the Supreme Court said:

> . . . "Certainly there is nothing in the language of §303(a)(4) which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed. Rather, the opposite seems to be true. For the *jurisdictional* disputes proscribed by §303(a)(4) are rendered unlawful 'for the purposes of this section only', *thus*

setting apart for private redress, acts which might also be subjected to the administrative process . . . Section 303(a)(4), as explained by Senator Taft, its author, 'retains simply a right of suit for damages against any labor organization which undertakes a secondary boycott or a jurisdictional strike.'

. . . *"Here the jurisdictional row was between the outside union and the inside union. The fact that the union of mill employees temporarily acceded to the claim of the outside group did not withdraw the dispute from the category of jurisdictional disputes condemned by §303(a)(4);* Petitioners, representing one union and employing outside labor, were trying to get the work which another union, employing mill labor, had. *That competition for work at the expense of employers has been condemned by the act . . ."*

Petitioner would especially call the Court's attention to the portion of the above quoted opinion which strongly implies that a "jurisdictional dispute" is an essential element of Section 8(b)(4)(D); and, that it is precisely these "disputes" that are condemned by §303(a) and (b). In Juneau, two unions were actively battling for the assignment of particular work and the Court in that case naturally found that a real "dispute" existed under the law even though the mill employees did not dispute the longshoremen's claim "temporarily." In the instant case, the Millwrights did not merely *temporarily* acquiesce, they *never* did anything but acquiesce from start to finish.

On the basis of the above discussion, Petitioner suggests that the Supreme Court has not made it clear, as Respondents contended, that in *Juneau Spruce* and *CBS*, supra, the Court found that the only question in a §303 action is whether the picketing violated §8(b)(4)(D) without regard to the response of the incumbent union.

On the contrary, Petitioner believes these cases *do* imply that a genuine "jurisdictional dispute" is a prerequisite to any violation of §303.

Petitioner would respectfully urge the Court's attention to the overwhelming number of Board decisions that have acquitted unions of Section 8(b)(4)(D) charges where the Board was unable to find an active dispute between two competing groups of employees. Particularly illustrative among these cases is *Lathers Union* (Acoustics and Specialties, Inc.), 139 NLRB No. 44, 51 LRRM 1345. In *Lathers*, the employer was asked by the Lathers union to assign certain ceiling work, specifically the installation of an iron channel used to suspend ceiling framework for ceiling acoustical material to Lathers rather than Carpenters. These unions had little to do with each other, but the employer and the Lathers dickered over the merits of assigning the work to Lathers, and eventually the employer granted the work to the Carpenters and the Carpenters began doing the work. The Lathers then backed up their demand for the work with a picket. The picket was for the purpose of forcing or requiring the employer to assign the work to the Lathers rather than to the Carpenters.

On these facts, the Board dismissed, and held there was no Section 8(b)(4)(D) violation, in language as follows:

> "The Board has noted on previous occasions that implicit in the thrust of the Supreme Court's decision in the CBS case is the proposition that Section 8(b)(4)(D) and 10(k) were designed to resolve competing claims between rival groups of employees, and not to arbitrate a dispute between a union and an employer when no such competing claims are involved. Here there are no such competing claims."

The Board has consistently ruled in case after case that no violation of Section 8(b)(4)(D) exists unless there are competing groups of employees claiming the work assignment. For other cases similar to *Lathers*, see *National Assn. of Broadcast Employees & Technicians* (Gordon Broadcasting of San Diego, Inc.), 127 NLRB 1070 (1960) 46 LRRM 1153; *Local 9, Electrical, IBEW* (G.A. Rafel & Co., Inc.) 128 NLRB 899 (1960) 46 LRRM 1411 (review den. 47 LRRM 2897), cert. den. 48 LRRM 2324); *Local 107 Teamsters* (Safeway Stores, Inc.) 134 NLRB 1320 (1961) 49 LRRM 1343; *Locals 70 & 85 Teamsters* (Hills Transportation Co.) 136 NLRB 1086 (1962) 49 LRRM 1930; *Local 272, Sheet Metal Workers* (Valley Sheet Metal Co.) 136 NLRB 1402 (1962 50 LR RM 1017; *Local 373, Plumbers & Pipefitters* (Carleton Bros Co.) 137 NLRB 628 (1962 50 LRRM 1222; *Local 1905, Carpet, Linoleum & Soft Tile Layers* (Southwestern Floor Co.) 143 NLRB 251 (1963) 53 LRRM 1324; *Norther Imperial* (Local 2382, Pile Drivers) 143 NLRB 758 (1963) 53 LRRM 1419; *Danville Printing Pressmen, Local 257* (Sperry Rand Corp.) 147 NLRB 1619 (1964) 56 LRRM 1453. See also NLRB General Counsel Rulings Nos. SR-986 (1960), 47 LRRM 1052; SR-1708 (1961) 49 LRRM 1482; SR-1738 (1962), 49 LRRM 1617; SR-1825 (1962) 49 LRRM 1861; SR-1993 (1962) 50 LRRM 1155; SR-2177 (1962), 52 LRRM 1020.

In the case of *Penello v. Local 59 Sheet Metal Workers*, 159 F. Supp. 458, 48 LRRM 2495, (D.C. Del. 1961), the District Court undertook a very thorough and learned examination of issues relevant to the case at hand. In *Penello*, the Sheetmetal Workers struck in order to force DuPont to assign work to them rather than to some other

group. The case was brought to trial by a Regional Director of the National Labor Relations Board, proceeding under 10(1) of the Act, authorizing such Regional Directors to bring suit to enjoin violations of Section 8(b)(4)(D) in the appropriate Federal District Court.

The Court, in *Penello,* found that some of the unionized workers who were doing the sheet metal work co-operated with Local 59 in refusing to cross the picket line, and their union did not even care to be a party to the 10(k) proceeding. It is submitted that the rationale by which the Court in *Penello* determined that no violation of section 8(b)(4)(D) existed represents the correct analysis of this problem. The Court in *Penello* stated as follows:

> "The language of this section is extremely broad, even though Congress continually referred to it as a ban on jurisdictional disputes in which rival groups of employees use economic coercion against each other with the employer trapped in the middle. *It would seem on its face to render illegal any coercive economic activity designed to force an employer to assign work to one group of employees rather than to another. It would in effect create a broad employer prerogative to assign work to whomsoever he chose free of economic pressure brought to bear by any other employee group. This prerogative would, moreover, be protected by the law even if all employee groups involved had agreed among themselves as to which should have the work.* A fortiori, the fact that competing claims for the work have not been made by rival groups of employees would be of no significance. Were the naked language of §8(b)(4)(D) the only guidepost for the Court, there could be little question about the result in this case."

After a thorough review of legislative history and court and labor board decisions, the Court said: *"The only dispute is between DuPont and Local 59.* Picketing in such a situation is not proscribed by Section 8(b)(4)(D) because it does not involve a dispute between rival groups of employees over particular work." In a footnote to that language, the Court stated as follows:

> "This is not a holding that the presence of an economic preference on the part of an employer renders Section 8(b)(4)(D) inoperative when there is a dispute between groups of employees over particular work. The purpose of Section 8(b)(4)(D) and 10(k) is not to aid the employer in the settlement of such issue, but simply to remove him from the impossible situation of being unable to satisfy two or more groups."

Respondents selected a phrase of dicta from the case of *Carpenters Local 978 v. Markwell,* 305 F.2d 38, and advanced it for the proposition that a jurisdictional dispute may exist "solely between an employer and a union". This single phrase from the Eighth Circuit Court of Appeals' decision is somewhat of an anomaly within the context of the decision itself, and is even more difficult to comprehend in the light of the previously discussed authority found in legislative history, Supreme Court decisions, other federal court decisions, and decisions of the Board. The case was tried under the pre-Landrum-Griffin law. It was first decided on other issues, and remanded; and then when before the trial court a second time, it was dismissed on the basis that no violation had been established. The phrase cited by Appellants was not relevant to the disposition of the case.

Respondents urged *NLRB v. ILA Local 1291* (Pocahontas Steamship) 368 F.2d 107 (3d Cir. 1966) wherein "Union B" was willing to let the picketing "Union A" do the work, as long as Union B got the pay. As Appellants quote, the Court found that Union B's claim was nonetheless vigorous. Pocahontas is distinguishable from the case at bar because (1) the Engineers did not have a contract and (2) the Millwrights disclaimed the work and did not expect to be paid for the work they disclaimed.

In *Carpenters v. Montag & Sons*, 335 F.2d 216 (9th Cir. 1964), we again have the Pocahontas situation of a "Union B" that is "not unwilling that the other should come in . . . if (Union B) will still continue to get paid for the work". Moreover, the decision reflects a rather hefty dispute between the two unions, with both sending "international representatives to the job site to adjust the dispute", "tentative agreements" between the unions, the "dispute" not being "solved", as well as the invocation of the National Joint Board for settlement of Jurisdictional Disputes, the body charged with settling disputes between unions. The Court stated as follows:

> "Montag and the other appellees reply that the statute may not be read as if it contained a requirement that there be an active dispute between two unions but that, if the statute must be so read, the requirement is fulfilled by the facts of this case. We agree with the appellees' alternative contention that there was in fact an active dispute between two unions, *and therefore find it unnecessary to explore their argument for a literal reading of the statute. This case does not resemble at all the case of Penello v. Local Union 59, Sheet Metal Workers,* 195 F. Supp. 458 (D.C. Del.) *upon which the excellent opinion in which the appellants rely heavily.*"

As the Court pointed out above, *Montag* was indeed a "typical case" of an employer caught between two unions —and accordingly dissimilar to the case at bar.

Finally, the Court of Appeals in the instant case, relied heavily on *Plumbers, Local 761 v. Matt J. Zaich Construction Co.*, 418 F.2d 1054 (9th Cir. 1969) as a case in point that "fully supports the result reached in this case." *Zaich* involved a suit under Section 303 for damages arising out of a jurisdictional dispute, where the out-union picketed after the employer refused to abide by an arbitration award assigning it the disputed work. The Plumbers (out-union) argued that the money damages authorized under Section 303 could not be recovered *unless the Board had first determined that a union's conduct constituted an unfair labor practice under Section 8(b)(4)(D), and that the union had then violated the Board's order.* The Ninth Circuit, relying on *International Longshoremen's Union v. Juneau Spruce*, supra, held that the Section 303 remedy remains separate and independent of the Section 10(k) and Section 10(l) provisions for settlement; that the 1959 amendments to Section 303 *did not incorporate the entire statutory machinery for settlement of disputes under Section 8(b)(4)(D);* and that actions under Section 303 were not dependent *upon prior administrative determinations*, despite the statutory scheme which is provided for the determination of jurisdictional disputes. Petitioner has no quarrel with this case whatsoever. It involves the same legal point discussed in *Juneau* and is not applicable to the case at bar. In *Zaich* there was an open conflict between two unions, a genuine "jurisdictional dispute" existed and the out-union was simply attempting an artful dodge to avoid liability. In

the instant case a true "jurisdictional dispute" does not exist because the only dispute is between the sub-contractor and the Engineers.

CONCLUSION

Petitioner, in conclusion, would submit that this group of employers who now seek to have Engineers adjudicated liable to them in the sum of Two Hundred Thousand Dollars were hardly within the class of helpless and innocent employers intended and contemplated by Section 8(b)(4)(D) of the Act.

Petitioner suggests that this case represents an effort on the part of this association of construction employers to expand Section 8(b)(4)(D) into every labor dispute involving an identified piece of work, and thereby cut deep inroads into labor's basic right to forcefully but lawfully seek its legitimate goals. The legislative history abhors such a construction, and the cases cited by Respondents fall far short of the result that Respondents would use them to reach.

WHEREFORE, Premises Considered, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

W. ARTHUR COMBS
Attorney for Petitioner

Of Counsel:
JEANNE WARREN

Certificate of Service

I certify that a copy of the foregoing Petition for Certiorari was mailed to Mr. V. Reagan Burch of Baker, Botts, Shepherd & Coates, Attorneys for Respondents, 1600 Esperson Building, Houston, Texas, on this 28th day of August, 1972.

APPENDIX

I.

Extract from Labor Management Relations Act, 1947, as Amended by Public Law 86-257, 1959, 29 U.S.C. §§ 151, et seq.

Unfair Labor Practices

Sec. 158

(b) It shall be an unfair labor practice for a labor organization or its agents—

***

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

***

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work. . . .

**Prevention of unfair labor practices—
Powers of Board generally**

Section 160 . . .

(K) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

**Unlawful activities or conduct; right to sue;
jurisdiction; limitations; damages**

Section 187.

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in Section 158 (b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

II.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 66-H-411

CONSTRUCTION EMPLOYERS' ASSOCIATION OF TEXAS, ET AL

VS.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 450, AFL-CIO.

Baker, Botts, Shepherd & Coates (V. R. Burch, Jr., and William R. D'Armond), of Houston, Texas; for Plaintiffs.

Combs & Mitchell (W. A. Combs), of Houston, Texas; for Defendant.

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[375] MEMORANDUM AND ORDER OF DISMISSAL
(Filed July 10, 1969)

This is an action brought under Section 303 of the National Labor Relations Act (the Act), 29 U.S.C.A. § 187, in which the Plaintiffs allege that the Defendant Union violated the Act by picketing Gate 38 of Plaintiff

OPINION (Southern District Court of Texas)

The Dow Chemical Company's Plant B at Freeport, Texas, on March 23 and 24, 1966, in support of certain alleged objectives which are more fully set out hereinafter.

The Defendant admits that the picketing occurred, but denies that it was unlawful.

The cause was tried by the Court on April 14 and 15, 1969, on the issue of liability only. After hearing the evidence presented, the parties were allowed to submit briefs.

The Plaintiffs in this cause are The Dow Chemical Company which operates two large industrial plants in Freeport, Texas, and ten companies that do construction work or perform maintenance service in the Dow plants. [376] The Defendant Operating Engineers, Local 450, is a labor organization which represents a number of employees of various companies that perform work in the Dow plants.

The Plaintiff Contractors are engaged in the business of industrial construction, or maintenance work, or supplying materials or equipment, or rendering services relating to such work, and are in a non-profit association which has as its members various industrial contractors, including most of the Plaintiff Contractors. The Association, which is a corporation, represents its members in bargaining with various unions, including Local 450. At all times relevant to this case the Association and Local 450 have been parties to a collective bargaining agreement.

OPINION (Southern District Court of Texas)

The operations of the Plaintiff and the Defendants are conducted in interstate commerce, and such operations substantially affect interstate commerce, and the rights of the parties in this litigation are governed and controlled by the laws of the United States with reference to interstate commerce.

On or about March 19, 1966, Ashley-Hickham Maintenance and Engineering Company (hereinafter called "Ashley-Hickham") began certain maintenance and repair work on Turbine Generator Unit No. 2, Power Plant No. 4, in Dow's Plant B. Ashley-Hickham engaged in this work under a subcontract between it and General Electric Company who had the main contract with Dow to do such work. The work being done by Ashley-Hickham required the use of a permanently installed overhead crane which is owned by Dow. The crane can be operated either from the cab or from the ground by a pendant control, a switch mechanism at the end of an electrical cable hanging from the crane.

At the time this work was being performed and for several years prior thereto, as far back as 1964, Ashley-Hickham recognized and had a labor contract with Millwrights [377] Local Union No. 2232, and employed a number of employees who were members of or represented by that labor organization. These employees will hereinafter be called "Millwrights".

Ashley-Hickham had done some like jobs for Dow, which required the use of the overhead crane, during the preceding years, and had used the Millwrights to operate the crane on some seven prior occasions. At the time of the picketing complained of, Ashley-Hickham had no

labor contract with Defendant Local 450 and had no employees on its payroll who were members of or represented by Local 450 which had jurisdiction in the area of the Dow Plants at Freeport.

On more than one occasion, both before and after Ashley-Hickham began its work around March 19, 1966, representative of Local 450 requested of representatives of Dow, General Electric and Ashley-Hickham that the operation of the crane in question be assigned to an operating engineer of Local 450.

The evidence is in dispute as to the actual conversations or demands of the Defendant Operating Engineers, but suffice it to say that regardless of what the exact demands were, none of them were honored by Ashley-Hickham who continued to have Millwrights operate the crane when needed.

The contract of Ashley-Hickham with the Millwrights did not provide that the Millwrights would operate the crane in question.

Mr. B. C. Ashley, of Ashley-Hickham, testified by deposition that there was no actual understanding between it and Dow that Millwrights would be used on the job to operate the crane, but that Dow only demanded that if the crane was operated from the cab, Ashley-Hickham would use an operating engineer employed by Dow.

The evidence is abundant that the Millwrights had always operated the crane by using the pendant controls, not only before the picketing but many times thereafter. [378] Mr. Ashley has testified that it was area practice

for the Millwrights to operate the crane in question as a tool of the trade.

On March 23, 1966, at approximately 7:00 a.m., Local 450, through its duly authorized representatives and agents, established a picket line at Dow's Gate 38, a construction gate then being used by employees of Ashley-Hickham and all of the Contractor Plaintiffs with the exception of Monical & Powell, Inc., and the electrical contractors. The picketing was peaceful, and the picket signs contained the following language:

"ASHLEY-HICKHAM
MAINT. & ENGR. INC.
DOES NOT EMPLOY NOR
HAVE A CONTRACT WITH
LOCAL UNION 450
OPERATING ENGINEERS"

Union members then using such gate failed or refused to cross the picket line, and did not report to work, with the exception of the Millwrights employed by Ashley-Hickham who had entered the plant before the picket line was established, and who reported to their jobsite. However, when the Millwrights learned of the picketing they left the plant. The picketing continued until approximately 4:00 p.m. on March 23rd, and resumed the following morning at 7:00 a.m., at which time Union employees using Gate 38 again failed or refused to cross the picket line. The picketing was discontinued at approximately 9:30 a.m. on March 24, 1966, and by the following day operations within Plant B were again back to normal.

Some thirteen hundred employees of the Plaintiffs were affected by the pickets.

There is no question that the failure to use an operating engineer on the crane in question was for economic reasons. It seems that when an operating engineer [379] operates the crane he does so from the cab, and a person has to be on the ground to direct the movements of the crane by passing on by signs information to the operating engineer. On a pendant-controlled crane, the person operating the switches is on the ground and no one is needed to relay signs regarding the movement of the crane.

It is alleged, and I find, that during the beginning and ending of a job such as Ashley-Hickham was doing, the crane is used about seventy-five per cent (75%) of the time, but in between while the actual maintenance work is being done the crane is used very sparingly and no more than five to ten per cent (5 to 10%) of the time.

Plaintiffs allege that the hiring of an operating engineer under these circumstances would amount to featherbedding, as the millwright who operated the crane from the pendant controls would still have to be on the job to direct the movements of the crane while an operating engineers was in the cab.

The Plaintiffs are suing for damages, claiming that the picketing in question was illegal and in violation of Section 8(b)(4)(D) of the National Labor Relations Act, 29 U.S.C.A. § 158(b)(4)(D), which violation would support an action for damages brought under Section 303 of the Act, 29 U.S.C.A. § 187.

OPINION (Southern District Court of Texas)

The Plaintiffs' main contention is that by demanding that Ashley-Hickham be required to assign operation of the overhead crane to Operating Engineers or to bargain and sign a contract with Local 450, a violation of Section 8(b)(4)(D) of the Act occurred.

The Union, on the other hand, contends that the picketing was not unlawful and was solely for organizational purposes and in an effort to induce Ashley-Hickham to enter into a collective bargaining agreement with Local 450 which would provide for the employment of members of Local 450 in [380] the operation of the overhead crane, and guarantee the payment of benefits to them under the Union's Pension and Welfare Fund.

There is no question that one of the objects of the picketing by Operating Engineers was to have the Millwrights that were operating the crane in question replaced by an operating engineer, and this, the Plaintiffs say, is sufficient to sustain a claim for damages under § 8(b)(4)(D) of the Act.

The testimony is in conflict as to whether the business agents of Local 450 ever demanded a contract, but the picket sign itself showed that Local 450 was complaining of not having a contract with Ashley-Hickham.

One of the factual disputes in this case has to do with whether or not the Millwrights were claiming the right to operate the crane. Evidence before the Court shows clearly that the Millwrights complained to Ashley-Hickham when iron workers were allowed to operate the crane.

Shortly before the commencement of the job in question, Mr. Ashley inquired of Jack O. Fountain, who at that

time was the business representative of Millwrights Local 2232, what would happen if the Operating Engineers took action to demand the operation of the Crane, and Fountain informed Ashley that if that time ever came they would find a way to claim the work.

There is no question that Fountain had told officials of Operating Engineers that the Millwrights were claiming the right to operate the crane as a tool of their trade.

Fountain explained the actions of the Millwrights by explaining that they knew that the operation of the crane belonged to the Operating Engineers, but that they many times made such claims so as to get concessions from other unions on other matters.

[381] From all the evidence, a finding that the Millwrights were claiming the right to operate the crane in question can be made.

The paramount question, however, is whether the claim being made by the Millwrights was of such a nature as to make it a bona fide jurisdictional dispute between the Millwrights and the Operating Engineers.

If one reads § 8(b)(4)(D) by itself, there is no question but that Plaintiffs could recover in this case. However, a reading of the Act, and especially its amendments of 1947, shows clearly that § 8(b)(4)(D) of the Act was not what it would seem to be, reading it apart from the rest of the Act, for at the same time that § 8(b)(4)(D) was passed Congress also passed § 10(k), 29 U.S.C.A. § 160(k), which provided for the National Labor Relations Board to settle jurisdictional disputes.

OPINION (Southern District Court of Texas)

That § 8(b)(4)(D) cannot be looked to by itself, but must be read in conjunction with § 10(k) of the Act, has been made abundantly clear. *National Labor Relations Board v. Radio and Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO*, 364 U.S. 573.

Both sides to this dispute have cited the Court many cases, none of which are on all fours with ours. A thorough reading of all the cases cited, and a reading of the Act itself has led this Court to reach the following conclusion:

The amendments to the Act of 1947, and especially §§ 8(b)(4)(D) and 10(k) of the Act, were devised to prevent an employer from being caught in the middle of a genuine jurisdictional dispute between two groups of employees, union or not.

The Taft-Hartley Act itself and the proceedings in Congress during its amendment in 1947 show clearly that [382] the right of unions to picket was not to be lightly taken away because of the Act or its amendments.

There is no evidence in this case that the Millwrights ever told Ashley-Hickham that if the Operating Engineers were given the job of operating the crane, they themselves would strike. In fact it is abundantly clear that the Millwrights honored the picket of the Operating Engineers.

Plaintiffs allege that at the beginning Fountain did not even know why the picket was put up, but it seems inconceivable that during the course of the picketing the Millwrights did not find out why the pickets were up.

I find, therefore, that under the Act, the protection and claim for damages by an employer under § 8(b)(4)

(D) can only be resorted to in a genuine jurisdictional dispute where two sides of employees inform the employer that they will strike if the work is given to the other, or the employer is under contract to assign the work to a particular group. In other words, § 8(b)(4)(D) of the Act cannot be read literally. If it could, there is no question but that the Plaintiffs in this case would have a good cause of action and would prevail.

No case that has been cited to this Court has made the finding that is being made here, but it is a finding which is made necessary by the Act and the cases.

If this finding is correct and the Congress intended to give employers a remedy which a literal reading of § 8(b)(4)(D) apparently intended to give them, the door is open for action by Congress.

If this finding does not withstand appellate review, then it is clear that actions such as the action of Operating Engineers under the facts here will be compensable.

The above constitute the Findings of Fact and Conclusions of Law of the Court.

Finding that under the facts Defendant Operating Engineers did not violate § 8(b)(4)(D) of the Act.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that this cause be, and the same is hereby dismissed.

Clerk will send copies of the Memorandum and Order of Dismissal to counsel for the parties.

DONE at Brownsville, Texas, this 10th day of July, 1969.

/s/ REYNALDO G. GARZA
United States District Judge

III.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28387

CONSTRUCTION EMPLOYERS' ASSOCIATION OF TEXAS, ET AL., *Plaintiffs-Appellants,*

versus

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 450, AFL-CIO, *Defendant-Appellee.*

Appeal from the United States District Court
for the Southern District of Texas

(June 4, 1970)

Before THORNBERRY, DYER and CLARK, Circuit Judges.

CLARK, Circuit Judge: Construction Employers' Association of Texas (Association) appeals from the dis-

missal of its suit under section 303 of the Labor Management Relations Act[1] for damages sustained because of picketing by the International Union of Operating Engineers, Local 450, AFL-CIO (Operating Engineers) in violation of Section 8(b)(4)(D) of the National Labor Relations Act.[2] Because we disagree with the District Court's holding that the picketing did not constitute an unfair labor practice within the meaning of section 8(b)(4)(D), we reverse.

Ten companies which do maintenance and construction work for The Dow Chemical Company (Dow) comprise the members of the Association. One contractor not a member of the Association and the Dow Chemical Company joined with the Association as plaintiffs in the court below. The Association represents its members in bargaining with various unions. At all times relevant to this case the Association and the Operating Engineers have been parties to a collective bargaining agreement.

In March 1966 Ashley-Hickman Maintenance and Engineering Company (Ashley-Hickman) began maintenance and repair work for Dow at one of Dow's plants in Freeport, Texas. This work required the use of a permanently installed overhead crane which could be operated from a cab or from the ground by a pendant control. Ashley-Hickman directed its employees who were to do the maintenance work to operate the crane from the ground using the pendant control. These employees were members of Millwrights Local Union No. 2232 (Millwrights),

1. 29 U.S.C.A. §187.

2. 29 U.S.C.A. §158(b)(4)(D).

which had a collective bargaining agreement with Ashley-Hickman. While operation of the crane was not provided for in the collective bargaining agreement, the practice for seven similar jobs undertaken in previous years by Ashley-Hickman for Dow, and the general practice in this area, were that the Millwrights operated the crane as a tool of this trade. Moreover, the court below found that the Millwrights claimed the work.

Although the Operating Engineers had no collective bargaining agreement with Ashley-Hickman, on numerous occasions before and after work began, the Operating Engineers requested that the operation of the crane be assigned to them. An Operating Engineer could only operate the crane from the cab with the help of a Millwright on the ground to direct him. The Millwright, however, could operate the crane from the ground by himself, using the pendant control. During the beginning and ending of the maintenance work the crane was used about seventy-five percent of the time, but while the actual maintenance work was being done the crane was used not more than five to ten percent of the time. During the time that the crane was not in use, an Operating Engineer, merely seated in the crane cab, would have no work on the job site.

On March 23, 1966, after Ashley-Hickman had refused to hire an Operating Engineer to operate the crane, the Operating Engineers established a picket line at a Dow construction gate then being used by employees of Ashley-Hickman and of some of the Association's members. The District Court found that a purpose of the picketing was

to force Ashley-Hickman to reassign operation of the crane from a Millwright to an Operating Engineer. Union members who used the gate honored the picket line and did not report for work. Millwrights who were working at the Ashley-Hickman worksite were in the plant before the picket line went up but left after they heard of the picketing. The picketing continued until the next day and affected about 1300 employees. This suit for damages under section 303 followed, which the district court dismissed because it determined that there was no genuine jurisdictional dispute.

Since one reason for the Operating Engineers picketing was found to be to force Ashley-Hickman to reassign work held by the Millwrights to the Operating Engineers, such picketing is clearly proscribed by the words of section 8(b)(4)(D), which makes it an unfair labor practice for a union to picket or threaten to picket where an object is *inter alia*: "forcing or requiring any employer to assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization . . ." Section 303 confers a course of action for damages arising from such an unfair labor practice.

The rationale of the section 8(b)(4)(D) prohibition of jurisdictional strikes is that industrial peace should not be subject to disruption by inter-union squabbles over work assignments. Interunion work assignment disputes are primarily a problem for the unions to settle between themselves and should not be allowed to injure an innocent employer. *Longshoremen's Union v. Juneau Spruce Corp.*, 342 U.S. 237, 245, 72 S.Ct. 235, 240, 96 L.Ed. 275

(1952); *Plumbers, Local 761 v. Matt J. Zaich Construction Co.*, 418 F.2d 1054, 1057 (9th Cir. 1969). Moreover, section 8(b)(4)(D) as a practical matter protects the workingmen of the in-union, who have an arguably valid claim to the assigned work, from unjustified interferences by another union which is antipathetic or hostile to their interests.

The Operating Engineers strenuously contend that the evils which the Act sought to prevent were not present in the instant case and, thus, it should not be applied to them. This is not a case, they argue, where the in-union either claimed or wanted the assigned work. There being no opposition by the Millwrights to the proposed assignment of the work to the Operating Engineers, the real dispute was between the Operating Engineers and Ashley-Hickman. The conclusion to this reasoning is obvious: The strike resulted from an ordinary, everyday, management-labor economic dispute and was not within the scope of section 8(b)(4)(D). The facts, however, are otherwise. The trial judge found that the Millwrights claimed the work. This finding is amply supported in the record and is far from being clearly erroneous. The Millwrights had vigorously complained to Ashley-Hickman when iron workers were allowed to operate the crane on a prior occasion. The Millwrights' business representative testified that the Millwrights claimed the work. Prior to the picketing he told officials of both the Operating Engineers and Ashley-Hickman that the Millwrights claimed the work. The Millwrights' claim to the assigned work was more than arguably valid. There is undisputed evidence that the area practice and the practice between the parties for seven

similar previous jobs was that the Millwrights operated the crane as a tool of the trade.

The Operating Engineers, however, even conceding that the Millwrights claimed the work, reason that a *"mere"* claim is not sufficient to bring into force a statute which is on its face applicable. This is semantic sophistry. Jurisdictional strikes have been precisely condemned by Congress and "the damage suit provisions which Congress inserted in the law . . . should not be given a narrow interpretation." *Brotherhood of Carpenters v. C. J. Montag & Sons, Inc.*, 335 F.2d 216, 219 (9th Cir. 1964). The point that the Millwrights honored the picket line does not bolster their contention that there was no real inter-union dispute in the eyes of the law.

In *Longshoremen's Union v. Juneau Spruce*, supra, the Supreme Court dealt with a problem similar to the instant case. When the employer who manufactured lumber decided to ship the lumber himself using barges, he assigned the loading of the barges to the employees represented by the in-union. A demand by the Longshoremen's Union that its members be given the loading work was rejected and the longshoremen picketed. The picket line was honored for three months by the in-union. Nonetheless the Supreme Court affirmed a damage award against the Longshoremen stating:

> "The right to sue in the courts is clear, provided the pressure on the employer falls in the prescribed category which, so far as material here, is forcing or requiring him to assign particular work 'to employees in a particular labor organization' rather than to

> employees 'in another labor organization' or in another 'class.' Here the jurisdictional row was between the outside union and the inside union. The fact that the union of mill employees temporarily acceded to the claim of the outside group did not withdraw the dispute from the category of jurisdictional disputes condemned by § 303(a)(4); Petitioners, representing one union and employing outside labor, were trying to get the work which another union, employing mill labor, had. That competition for work at the expense of employers has been condemned by the Act." 342 U.S. at 244-45, 72 S.Ct. at 239-40.

Furthermore, it has long been recognized that a jurisdictional dispute does not necessitate bloody combat between the two unions claiming the same work. In the instant case, the Millwrights did not stand to lose any wages if an Engineer was allowed to operate the crane. Operation of the crane was incidental to the performance of the maintenance work. Counsel for the Operating Engineers agreed during oral argument that Ashley-Hickman's compliance with their demands could have resulted in a situation where a Millwright would continue to operate the crane from the ground while the Operating Engineer sat idle in the seat in the cab. In *International Brotherhood of Carpenters v. C. J. Montag & Sons, Inc.*, supra, the Ninth Circuit stated:

> The fact that one union has the jobs and holds on to them in a polite, nonbelligerent manner while the other union used the forbidden tactics in an effort to get them, or get some of them, does not mean that what Congress regarded as the evils of a jurisdictional dispute are not present. And the fact that

> the union which has the job is not unwilling that the other union should come in and do some of the work and get paid for doing it, if the first union will still continue to get paid for the work, does not remove the situation from the category of jurisdictional disputes. 335 F.2d at 221.

See NLRB v. Local 1291, Longshoremen, 368 F.2d 107, 110 (3rd Cir. 1966).

The operating Engineers' reliance on *Penello v. Local 59, Sheet Metal Workers,* 195 F.Supp. 458 (D. Del. 1961), is misplaced. *Penello* expressly noted that there was no in-union or other group of workers claiming the work. The essence of the dispute in that case was not whether the Sheet Metal Workers would do the work but whether they would be given travel pay. The employer would not have been bound by a 10(k) proceeding, thus there was no jurisdictional dispute. 195 F.Supp. at 462.

The employer in this case assigned the work to the Millwrights on valid nondiscriminatory grounds. The Millwrights performed the work and claimed the right to continue performance of the work. The area and party practices were that the Millwrights were entitled to operate the crane. On these facts, section 8(b)(4)(D) made the picketing by the Operating Engineers an unfair labor practice for which damages are recoverable.

A recent decision of the Ninth Circuit, *Plumbers, Local 761 v. Matt J. Zaich Construction Co.,* supra, fully supports the result reached in this case. In *Zaich* the out-union picketed after the employer refused to abide by an arbitration award assigning it the disputed work. On the

force of the favorable arbitration award and the employer's refusal to replace the in-union, the out-union picketed the job site. The picketing was halted by the NLRB pursuant to 29 U.S.C.A. § 160(1). In a subsequent 10(k) proceeding, 29 U.S.C.A. § 160(k), the Board found that the employer was not bound by the arbitration agreement and that the in-union was entitled to the work. The employer sued the out-union for damages under section 303, and the trial court's finding of a section 8(b)(4)(D) violation and award of damages was affirmed by the Ninth Circuit. The court found that in a work assignment dispute the self-help remedy of coercive picketing is not available to the out-union. The permissible alternatives were made quite clear: "If possible the dispute should be arbitrated; if the outside union has no contract requiring arbitration, then it should petition the Board in a representational action under section 8(a)(3)." 418 F.2d at 1057.

The legal alternatives available to the Operating Engineers were likewise clear and picketing was not among them. The findings of fact of the trial court fully support a conclusion that the Operating Engineers committed an unfair labor practice. The case is therefore remanded to the district court for a determination of damages.

REVERSED AND REMANDED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 618

INTERNATIONAL UNION OF OPERATING ENGINEERS, Local 450, AFL-CIO, *Petitioner*

v.

CONSTRUCTION EMPLOYERS ASSOCIATION OF TEXAS, ET AL., *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Construction Employers' Association of Texas, et al, oppose the Petition on the grounds that the Judgment of the Court of Appeals was correct, involved no novel issues and was consistent with well-settled interpretations of the National Labor Relations Act.

OPINIONS BELOW

The opinion of the District Court (Appendix II of Petition) is reported at 301 F.Supp. 49. The opinion of the Court of Appeals for the Fifth Circuit (Appendix III of Petition) is reported at ____ F.2d ____.

JURISDICTION

The facts relevant to jurisdiction are adequately set forth in the Petition. Respondents do not agree that the Fifth Circuit "has erroneously decided an important question of federal law which has not been, but should be settled by this Court."

QUESTION PRESENTED

Was the Petitioner's picketing, under the findings of the Trial Court and the Fifth Circuit Court of Appeals and the undisputed facts, a violation of Section 8(b)(4)(D), compensable by damages under Section 303 of the National Labor Relations Act?

STATUTORY AND PROCEDURAL RULES INVOLVED

The pertinent provisions of the National Labor Relations Act (the "Act") are adequately set forth in the Petition.

STATEMENT OF THE CASE

Petitioner's statement is not a complete and fair representation of the undisputed facts and findings of the lower Courts. Respondents' statement will be limited to stating more accurately those portions of the facts and findings which are relevant and which are either omitted

from or inadequately described by Petitioner's Statement of the Case.[1]

It would not ordinarily seem appropriate to burden a Brief in Opposition in this Court with an extended discussion of the evidence below. Petitioner's entire argument is based, however, on a factually incorrect premise—namely, the contention that the Millwrights did not "claim" the work in question and there was, therefore, no "jurisdictional dispute." This contention was rejected by both the District Court and Court of Appeals, and Petitioner does not contend that the findings below are factually erroneous. Nevertheless, we are constrained by Petitioner's incorrect premise to review in some detail the nature of the "dispute" and "competing claims" which formed the background of Petitioner's picketing.

Ashley-Hickham originally assigned the operation of the pendant controlled crane to its Millwrights on the basis of the practice in the area. Under that practice, Engineers operated cranes with controls in overhead cabs, but pendant controlled cranes were operated by the craft engaged in the primary work as a "tool of the trade." (App. 30-31, 73, 126, 329)[2] Ashley-Hickham believed

1. We shall refer to the parties and other persons by the proper names and abbreviations thereof used by Petitioner. Following Petitioner's usage, "App." refers to the printed Appendix filed in the Fifth Circuit September 9, 1969. "A.P.I," "A.P.II" and "A.P.III" refer to the Appendixes to the Petition herein. All emphasis in this Brief has been added unless otherwise noted.

2. Petitioner attempted to establish, on cross-examination, that Dow "called the shots" and required use of the pendant controlled crane as a tool of the trade. It was clear, however, and the Trial Court found, that Ashley-Hickham was free to assign the work as it saw fit. (App. 49-51, 328-29) If the picketing had been directed at Dow rather than Ashley-Hickham, the picketing, as well as Petitioner's threats to Dow representatives (App. 32-33, 57-58), would have clearly violated § 8(b)(4)(B).

that Millwrights Local 2232 considered this practice to be binding and that the Millwrights might have picketed if Ashley-Hickham had acceded to Petitioner's demand that operation of the crane be assigned to an Engineer. (App. 65-68, 77-81, 86-87) These beliefs had ample basis.

Before work began on the job in question, Engineer Business Agent Koch made numerous demands that Ashley-Hickham assign operation of the crane to an Engineer represented by Petitioner and threatened to picket and to "shut down" Dow and Respondent contractors if such work were not assigned to Engineers.[3] Some of these demands were made directly to the president of Ashley-Hickham; others were made to representatives of Dow and General Electric. (See, e.g., App. 29-35, 57-58, 99-100, 127) In one such conversation with a Dow representative, Koch said in substance that the Millwrights claimed the operation of the pendant controls of the crane as a tool of their trade, that the Operating Engineers did not recognize that claim and that the Millwrights had nothing "in black and white" to substantiate their claim. (App. 33, 43-44)

---

3. In view of the finding by the District Court that one of the objects of the picketing "was to have the Millwrights that were operating the crane . . . replaced by an operating engineer," it is not necessary to discuss Petitioner's unconvincing and irrelevant argument that it was seeking a contract which would give its members the work. The weight of the conflicting testimony is that no request for a contract was made. Nevertheless, the purpose of the picketing was unlawful even if a contract was desired. See, e.g.; *N.L.R.B. v. Denver Building & Construction Trades Council, et al.*, 341 U.S. 675 (1951); *Ernest Renda Contracting Co.*, 123 N.L.R.B. 1776 (1959); *Teamsters Local 525 (E. A. Weinel)*, 127 N.L.R.B. 1377 (1960); *Longshoremen's Union (General Org., Inc.)*, 124 N.L.R.B. 626 (1959); and *Anning-Johnson Co.*, 113 N.L.R.B. 1237 (1955).

Koch admitted that before the job in question began the Millwrights told him that they were going to run the crane (App. 112), and that Millwright Business Agent Fountain told him in connection with the work in question "that he'd have to go along with—I don't know who he meant, Ashley-Hickham or Dow, *but he was going to man the job* at that time." (App. 124) Koch further testified that he talked to Fountain around the time he put the picket line up, that he asked why the Millwrights were running the crane, and that Fountain told him in substance that on this job "he was going along with Ashley" and doing the work. (App. 125-26)

Engineer Business Manager McMahon admitted that in the past his union had on some occasions permitted other unions to operate pendant controlled cranes for "short" periods of time, and that he knew Fountain had told Koch that the Millwrights "were not claiming the work, but it had been assigned to them and somebody had to do the work." (App. 160-62)

The testimony of Fountain, a witness for Petitioner, removed any doubt there might have been about the Millwrights having "claimed" the work.

Before the job in question began, Fountain and Ashley discussed and resolved a dispute involving a complaint by the Millwrights against Iron Workers operating the overhead crane. (App. 172-73, 187) Ashley then asked Fountain what would happen if the Engineers kicked up a "fuss" regarding the overhead crane. Fountain's reply was, "What the heck. We'll cross that bridge when we get to it." (App. 172-73) At the trial, in response to leading questions, Fountain engaged in equivocations and

self-serving, after-the-fact explanations in an effort to negate the idea that the Millwrights "claimed" the work. It was evident, however, that Fountain had definitely and affirmatively asserted to the Operating Engineers and others in the trades *that the Millwrights had the right to operate the pendant controlled crane and intended to hold on to the work.*

Consider, for example, this colloquy on direct examination:

> "Q. Did you ever say to Mr. Ashley that the millwrights claim the work and that it belongs to millwrights? And by that, I'm talking about the operation of the overhead crane.
>
> A. Mr. Combs, let me answer that this way: In discussion with Ashley, I would say at different times that we had figured out ways and arguments that *we might could argue that this work was millwrights, yes, sir.*
>
> But, truthfully, I don't think that he believed or that I believed that the work was actually the work of the millwrights.
>
> The Court: Well, you were sure trying to find a way to claim that it was such, weren't you?
>
> The Witness: No, sir, I didn't place any claim on that work.
>
> The Court: Well, you told Mr. Ashley, 'We'll cross that bridge when we get to it,' and you told him that you were looking for a way to claim it for the millwright.
>
> The Witness: No, sir. I said at many times in discussions with Mr. Ashley we had discussed different ways that we might could claim the work.
>
> The Court: Oh, you might claim it?

The Witness: Yes, sir.

The Court: All right. You just want to add the word, 'might'? Put 'might'?

The Witness: I put 'might' in there the first time, sir." (App. 173-74)

When asked whether the Millwrights started "claiming" the work after the picket line went down, Fountain replied:

> "A. Well, Mr. Combs, this claiming the work is like a baseball player playing ball. He may know well that he's out, *but until that umpire says, 'Get out' he doesn't move off that base. He stays there and claims his place on the base.*
> And so work jurisdiction, or being assigned work, certainly is—*our people are taught that they don't get off the work until such time as the union instructs them to or the National Joint Board instructs them to.*" (App. 177)

On cross-examination Fountain interjected a statement that the "AFL-CIO Green Book" gives the work to the Engineers. Upon objection that the statement was not responsive to the question, the following exchange occurred between the Court and witness:

> "The Court: He answered the question. He already said once before that the Green Book gives him that job.
>
> But in spite of the Green Book, you did tell Mr. Ashley that you might claim that work?
>
> The Witness: Yes, sir. *I told Mr. Ashley that I might claim the work, definitely.*

The Court: In spite of the Green Book?

The Witness: *In spite of all the books, yes, sir.*" (App. 183)

Fountain testified that the Millwright knew the Operators would "raise cane" about the Millwrights operating the crane since they had previously done so. Then, with reference to Ashley's inquiry as to what the Millwrights would do if the Operators complained, Fountain testified as follows:

"Q. And when he asked you that, didn't you tell him, 'Well, what the heck; you know it belongs to them, *but we will go ahead and operate it. Let 'em raise hell if they want to. If it's your desire, sir, we will go ahead with it*'?

A. This is true.

Q. That is what you told him?

A. Yes, sir.

Q. And *you never did change that position with* Mr. Ashley, did you?

A. *Still haven't changed that position.*" (App. 184)

Foutain further testified as follows:

"Q. All right. Now, in talking to Mr. Ashley on other occasions about this work of operating the cranes, didn't you tell him that if it will help the job go better, we will perform the work as long as we can hold onto it?

A. I told Mr. Ashley this on many occasions, yes, sir.

Q. All right, sir. As a matter of fact, you have discussed the question of millwrights operating these cranes with representatives of the operating engineers in the past, have you not?

A. I have argued with the operators on their jurisdiction like I would argue with anyone else. It's customary, a business agent going to a job site, if they expect a problem on some work, they may claim two or three items knowing it doesn't belong to them, hoping to trade it back to the other side. It's negotiations, so to speak, hoping to trade them back to them, give them what belongs to them, give them what they've got an argument over. And I can recall, in all probabilities, more than one argument that I had with the operators over who was going to operate pumps and maybe I would say to them, 'If you don't let me operate your pump, well, I'm going to start claiming operating these overhead cranes,' and I can believe this because it happened.
Q. And you have argued not only with Mr. Koch, you have argued also with Mr. Gordon Hite, who is representative for the—
A. Argued with Gordy, argued with Burt Reynold.
Q. They're both representatives of Operating Engineers Local?
A. Yes.
Q. *And you have argued with them in effect that your men ought to be able to do that work, haven't you?*
A. Yes, sir.
Q. *Of operating the cranes?*
A. *Yes, sir.* I've argued that we could do a lot of work." (App. 185-86)

* * *

"A. We've had complaints arguing that the ironworkers—I had one no later than two weeks ago—that the ironworkers were operating overhead cranes.
Q. Complaints from your millwrights?
A. Yes, sir.
Q. Against the ironworkers?
A. Yes, sir.

Q. For operating the overhead cranes?
A. Yes, sir.
Q. But you never had millwrights complain to you because they, the millwrights, had been required to operate these cranes, had you?
A. I've never had a complaint because the people were required to, no, sir.
Q. All right, sir. As a matter of fact, *you have taken the position, in conversations with contractors and with other union representatives, that operating a crane like this is a tool of the trade, haven't you?*
A. *I probably argued this in instances, yes, sir.*
Q. Yes, sir. And as a matter of fact, you believe it, don't you?
A. No, sir.
Q. All right. You just take the position, you don't believe it?
A. I take the position that *this is a gray area that we like to argue over.* Somewhere you've got to have a point to argue with other people for this may be of trade value and you argue about it because you hope to trade it back to them and gain something else from them.
Q. *But there's no doubt that in the past you have told Mr. Koch, for example, of the operating engineers that your union claimed this work?*
A. *This is true.*" (App. 187-88)

* * *

The Trial Court's findings regarding the above testimony were as follows:

> "One of the factual disputes in this case has to do with whether or not the Millwrights were claiming the right to operate the crane. Evidence before the Court shows clearly that the Millwrights complained to Ashley-Hickham when iron workers were allowed to operate the crane.

> Shortly before the commencement of the job in question, Mr. Ashley inquired of Jack O. Fountain, who at that time was the business representative of Millwrights Local 2232, what would happen if the Operating Engineers took action to demand the operation of the crane, *and Fountain informed Ashley that if that time ever came they would find a way to claim the work.*
>
> There is no question that *Fountain had told officials of Operating Engineers that the Millwrights were claiming the right to operate the crane as a tool of their trade.*
>
> Fountain explained the actions of the Millwrights by explaining that they knew that the operation of the crane belonged to the Operating Engineers, but that they many times made such claims so as to get concessions from other unions on other matters.
>
> From all the evidence, *a finding that the Millwrights were claiming the right to operate the crane in question can be made.*" (A. P. II, pp. 37-38)

The District Court also found, however, that there was "no evidence in this case that the Millwrights ever told Ashley-Hickham that *if the Operating Engineers were given the job of operating the crane, they themselves would strike.*" (A.P. II, p. 39) (It is undisputed that the Millwrights never had occasion to make such a threat, since Ashley-Hickham steadfastly refused the Operating Engineers' demands.)

The District Court then stated:

> "I find, therefore, that under the Act, the protection and claim for damages by an employer under § 8(b)(4)(D) can only be resorted to in a *genuine jurisdictional dispute where two sides of employees*

inform the employer that they will strike if the work is given to the other, or the employer is under contract to assign the work to a particular group. In other words, § 8(b)(4)(D) of the Act cannot be read literally. If it could, there is no question but that the Plaintiffs in this case would have a good cause of action and would prevail.

"*No case that has been cited to this Court has made the finding that is being made here,* but it is a finding which is made necessary by the Act and the cases.

* * *

"*If this finding does not withstand appellate review, then it is clear that actions such as the action of Operating Engineers under the facts here will be compensable.*" (A. P. II, pp. 39-40)

On appeal to the Fifth Circuit Petitioner tacitly admitted that the District Court's decision could not be supported on the narrow grounds relied upon by that Court, i.e., the absence of an express strike threat by the Millwrights. Before this Court Petitioner makes the same admission:

". . . The District Court in the instant case held that there was no violation because the Millwrights did not seek to enforce their demand for the work. Even if, as Respondents contend, the District Court fell into error in requiring a threat to strike for a violation to exist, there must certainly be *something** to show conflict between the two unions, for disputes are never monolithic." (Petition, p. 14)

In the Court of Appeals and in its Petition to this Court, Petitioner therefore has contended in substance

* Emphasis in Petition.

that the Millwrights made no "claim" to the work. However, faced with the overwhelming evidence and the lower Court's findings that the Millwrights did indeed claim the work, Petitioner has couched in vague and shifting terms its descriptions of what constitutes a "genuine" jurisdictional dispute, has avoided to a remarkable degree any discussion of the Millwrights' true position regarding its claim to the work, and has *assumed* for the purpose of its argument that there was "a mere acceptance of the work" by the Millwrights (Petition, p. 13) and that there was "simply a dispute between the employer and the Engineers" (Petition, p. 15).

These same assumptions were rejected by the Court of Appeals as contrary to the evidence and to the findings of the District Court. The Court of Appeals also rejected as unsound the argument that the Millwright claim was of such a nature that the Engineers' picketing did not violate § 8(b)(4)(D):

> "The Operating Engineers strenuously contend that the evils which the Act sought to prevent were not present in the instant case and, thus, it should not be applied to them. This is not a case, they argue, where the in-union either claimed or wanted the assigned work. There being no opposition by the Millwrights to the proposed assignment of the work to the Operating Engineers, the real dispute was between the Operating Engineers and Ashley-Hickham. The conclusion to this reasoning is obvious: The strike resulted from an ordinary, everyday, management-labor economic dispute and was not within the scope of section 8(b)(4)(D). *The facts, however, are otherwise.* The trial judge found that the Millwrights claimed the work. This finding is amply supported in the record and is far from being

clearly erroneous. The Millwrights had vigorously complained to Ashley-Hickham when iron workers were allowed to operate the crane on a prior occasion. The Millwrights' business representative testified that the Millwrights claimed the work. Prior to the picketing, he told officials of both the Operating Engineers and Ashley-Hickham that the Millwrights claimed the work. The Millwrights' claim to the assigned work was more than arguably valid. There is undisputed evidence that the area practice and the practice between the parties for seven similar previous jobs was that the Millwrights operated the crane as a tool of the trade.

"The Operating Engineers, however, even conceding that the Millwrights claimed the work, reason that a '*mere*'* claim is not sufficient to bring into force a statute which is on its face applicable. *This is semantic sophistry.* Jurisdictional strikes have been precisely condemned by Congress and "the damage suit provisions which Congress inserted in the law . . . should not be given a narrow interpretation." *Brotherhood of Carpenters v. C. J. Montag & Sons, Inc.*, 335 F.2d 216, 219 (9th Cir. 1964). The point that the Millwrights honored the picket line does not bolster their contention that there was no real inter-union dispute in the eyes of the law.

* * *

"Furthermore, it has long been recognized that a jurisdictional dispute does not necessitate bloody combat between the two unions claiming the same work. In the instant case, the Millwrights did not stand to lose any wages if an Engineer was allowed to operate the crane. Operation of the crane was incidental to the performance of the maintenance work. Counsel for the Operating Engineers agreed

* Emphasis in Opinion.

during oral argument that Ashley-Hick*man*'s compliance with their demands could have resulted in a situation where a Millwright would continue to operate the crane from the ground while the Operating Engineer sat idle in the seat in the cab. In *International Brotherhood of Carpenters v. C. J. Montag & Sons, Inc.*, supra, the Ninth Circuit stated:

> " 'The fact that one union has the jobs and holds on to them in a polite, non-belligerent manner while the other union used the forbidden tactics in an effort to get them, or get some of them, does not mean that what Congress regarded as the evils of a jurisdictional dispute are not present. And the fact that the union which has the job is not unwilling that the other union should come in and do some of the work and get paid for doing it, if the first union will still continue to get paid for the work, does not remove the situation from the category of jurisdictional disputes. 335 F.2d at 221.'
>
> * * *
>
> "The employer in this case assigned the work to the Millwrights on valid non-discriminatory grounds. The Millwrights performed the work and claimed the right to continue performance of the work. The area and party practices were that the Millwrights were entitled to operate the crane. On these facts, section 8(b)(4)(D) made the picketing by the Operating Engineers an unfair labor practice for which damages are recoverable." (A. P. III, pp. 45-48)

ARGUMENT

The issue presented in this case is extremely narrow and does not warrant review by this Court. The first two questions presented in the Petition (page 3) are, quite simply,

contrary to the undisputed facts of the case. The third question stated in the Petition is the only one supported by the facts. And the only issue for possible determination by this Court under that question is whether the Millwrights' assertion of its members' right to perform the work was sufficient to support a finding that the Engineers' picketing violated Section 8(b)(4)(D). That issue is well settled, in favor of the Circuit Court's decision, by the decisions of this Court, other Circuit Courts and the Labor Board.

Petitioner asserts that this Court must determine whether the existence of a "jurisdictional dispute" is a prerequisite to a judgment under Section 303 of the Act for damages caused by picketing to force assignment of work to employees in a particular union rather than those in another labor organization. That question is simply not presented by this case. The lower Court determined that both unions claimed the work and that a "jurisdictional dispute" did exist. The question whether a violation of §8(b)(4)(D) may be found in the absence of *any* "competing claim" by the incumbent union is interesting but entirely academic under the undisputed facts of this case. Because of the District Court's holding concerning the absence of an express strike threat by the Millwrights, Respondents felt it necessary in the Court of Appeals to brief and discuss extensively the application of §8(b)(4)(D) to various jurisdictional strikes which have been considered by the Labor Board and courts. And in that discussion Respondents noted that the terms "claim" and "jurisdictional dispute" are merely generic terms not used in the Act, having no statutory definition and possessed of no inherent legal significance; that the Labor Board and courts have not given §8(b)(4)(D) the narrow and arti-

ficial interpretation asserted by Petitioner; and that violations of §8(b)(4)(D) have been found in many cases in which the incumbent union either (a) expressly disclaimed interest in the work, (b) made no claim or (c) expressed its claim less vigorously than did the Millwrights in the instant case. Respondents' suggestion below that a "claim" by the incumbent union is not an indispensable element of a violation of §8(b)(4)(D) was made in the alternative only, has been rendered moot by the decision of the Court of Appeals, and at this juncture is nothing more than a straw man erected to lend credence to the Petition.

A similar straw man is Petitioner's discussion of Respondents' alleged reliance upon the *CBS* case, *N.L.R.B. v. Radio Engineers Union*, 364 U.S. 573 (1961). (Petition, pp. 18-19.) Any argument based on *CBS* which Respondents made below is irrelevant *per se* to this Petition, and the basis for Respondents' opposition to the Petition will be found in this Brief rather than the Engineers' Petition. Respondents did not and do not rely on *CBS* for the proposition stated in the Petition. Respondents agree (and argued in the Court of Appeals) that *CBS* is of little or no value in the determination of the instant case. The question whether a "genuine" jurisdictional dispute is a prerequisite to a violation of §8(b)(4)(D) was not before the Court in *CBS*. A "dispute" clearly existed in *CBS*, and the sole issue before the Court was whether the Labor Board had abrogated its statutory duty by refusing to resolve the merits of that dispute. The Court's remarks in *CBS* concerning "jurisdictional disputes" were directed toward the scope and purpose of the two-stage administrative procedure before the N.L.R.B. and have little if any bearing on this case.

The thrust of the Petitioner's case from the beginning of this cause through the trial was simply that the Millwrights had not "claimed" the work. This defense was shaky at best, and it collapsed under the weight of the testimony of the Millwrights' Business Representative. Faced with the Millwrights' clear "claim" and their continued willingnes to perform the work, and recognizing that the Trial Court's narrow construction of the Act will not bear close scrutiny, Petitioner now argues that a "jurisdictional dispute" may exist even without a strike by the incumbent union, *but that the incumbent union must do something more than the Millwrights did here.* Not surprisingly, Petitioner does not explain how the Millwrights could have done anything more than they did short of putting up a picket line of their own or saying to Ashley-Hickam — in so many words — "We'll strike if you give in to the Engineers."

Petitioner's contention that no "dispute" existed is based in large part on the *assumption* that the Millwrights would not have picketed, if necessary, to get or retain the work. This assumption is contrary to the actions and assertions of the Millwrights Business Agent. In any event, the question whether the Millwrights would have struck if the work had been reassigned to Engineers is moot, since Ashley-Hickham — with the Millwrights' knowledge and concurrence — steadfastly rejected the Engineers' demands. The applicability of §8(b)(4)(D) is not dependent — under any decision of the N.L.R.B. or courts — upon *speculation* as to whether an incumbent union might or might not strike *if necessary* to enforce its claim.

The Petitioner's asserted application of § 8(b)(4)(D) is in essence and effect the same as that of the District

Court. Either application places form above substance and invites the careful phrasing of jurisdictional claims and other artful dodging.

There is no support in the cases, in the Act or in its legislative history for the strained and narrow construction which Petitioner would give § 8 (b)(4)(D) and § 303.

The legislative history of § 303 makes it clear that Congress felt it necessary to provide an effective remedy for and deterrent against the damages which all too often had been caused by "jurisdictional strikes," and that damage actions under § 303 were deliberately separated from the administrative procedures before the Labor Board. See, e.g., Vol. 2, *Legislative History, Labor Management Relations Act, 1947*, p. 1371. Speaking in May of 1947, Senator Taft referred to § 303 suits as follows:

> "After all, it is only to restore to people, who lose something, because of boycotts and jurisdictional strikes, the money which they have lost. *I do not think suits will often be brought, because I believe the possibility of a suit will be a sufficient deterrent* to prevent unions undertaking this kind of racketeering activity." *2 Legislative History, supra,* at 1371.

The restrictive interpretation given these remedial provisions of the Act by Petitioner's argument is obviously at variance with the aims of Congress as well as the decisions of the courts and Labor Board.

Longshoremen's Union v. Juneau Spruce Corp., 342 U.S. 237 (1952), was analogous to the present case. Juneau was engaged in the manufacture of lumber. Its employees were represented by the International Woodworkers of America. Juneau decided to ship lumber by the

use of barges and to utilize its own employees to load the barges. Local 16 of the Longshoremen's Union demanded that Juneau employ its members to load the barges. Juneau refused, and the Longshoremen set up a picket line. *The picket line was honored by most of Juneau's employees for some three months.*[4] Juneau's employees did not picket or threaten to picket. Like the Millwrights in this case, they simply claimed and continued to perform the work. A § 8(b)(4)(D) charge was filed by Juneau against the Longshoremen. A § 10(k) hearing was held, and the N.L.R.B. determined that the Longshoremen were not entitled to the work. The Longshoremen continued to picket, however, for one month after the § 10(k) determination issued. Juneau had filed a damage suit under § 303 prior to the § 10(k) determination. The Longshoremen contended that if Juneau was entitled to any damages, they should be limited to the time following the § 10(k) determination. The Supreme Court rejected this contention and upheld the lower Court's award of damages:

> "Section 8(b)(4)(D) and § 303(a)(4) are substantially identical in the conduct condemned. Section 8(b)(4)(D) gives rise to an administrative finding; § 303(a)(4), to a judgment for damages. The fact that the two sections have an identity of language and yet specify two different remedies is strong confirmation of our conclusion that *the remedies provided were to be independent of each other.* Certainly

4. Here, the evidence shows that the Millwrights were not aware that the Engineers' picket line was related to operation of the crane when they honored it. In any event, the picket was up for less than two days, and it is undisputed that the day after the picket was removed the Millwrights returned to the job, resumed operation of the crane and have operated it ever since. (App. 62-3, 68-9, 171, 176, 182, 186)

there is nothing in the language of § 303 (a)(4) which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed. Rather, the opposite seems to be true. For the jurisdictional disputes proscribed by § 303 (a)(4) are rendered unlawful 'for the purposes of this section only,' thus setting apart for private redress, acts which might also be subjected to the administrative process. *The fact that the Board must first attempt to resolve the dispute by means of a § 10(k) determination before it can move under § 10(b) and (c) for a cease and desist order is only a limitation on administrative power,* as is the provision in § 10(k) that upon compliance 'with the decision of the Board or upon such voluntary adjustment of the dispute,' the charge shall be dismissed. *These provisions, limiting and curtailing the administrative power, find no counterpart in the provision for private redress contained in § 303 (a)(4).* Section 303(a)(4) as explained by Senator Taft, its author, 'retains simply a right of suit for damages against any labor organization which undertakes a secondary boycott or a jurisdictional strike.'

"*The right to sue in the courts is clear, provided the pressure on the employer falls in the prescribed category which, so far as material here, is forcing or requiring him to assign particular work 'to employees in a particular labor organization' rather than to employees 'in another labor organization'* or in another class.' Here the jurisdictional row was between the outside union and the inside union. *The fact that the union of mill employees temporarily acceded to the claim of the outside group did not withdraw the dispute from the category of jurisdictional disputes condemned by § 303(a)(4); Petitioners, representing one union and employing outside labor, were trying to get the work which another union, employing mill labor, had. That competition for work at the expense*

of employers has been condemned by the Act. Whether that condemnation was wise or unwise is not our concern. It represents national policy which has both administrative and conventional legal sanctions."

Defendant has relied heavily on the District Court decision in *Penello v. Sheet Metal Workers Local 59*, 195 F.Supp. 458 (D.C. Del. 1961), for the proposition that § 8(b)(4)(D) proscribes picketing only "when it is employed as a means of resolving an active dispute between rival groups of employees which have asserted competing claims for particular work."

Penello was not a damage action under § 303 but an injunction action brought by the Labor Board (through Penello, its Regional Director). The underlying dispute bore no resemblance to this case. Du Pont had a large volume of sheet metal work to be done on a forthcoming project. In the past it had accomplished such work in many instances by employing subcontractors who had labor agreements with and used members of Local 59. In other cases Du Pont had hired members of other unions directly through hiring halls. The choice between these alternative methods was always dictated by economics alone, and Du Pont never questioned the "jurisdiction" of Local 59. The dispute which led to the injunction was also purely economic. Du Point negotiated with Local 59 about performance of a large volume of forthcoming sheet metal work—*which had not yet been assigned to anyone*—but the negotiations broke up over the question of travel pay demanded by Local 59. When Du Pont refused to agree to Local 59's terms and indicated an intention not to use its members, Local 59 began picketing. *At no material time was there any other union or group of employees to whom the forthcoming, disputed*

work had been assigned, and the Court noted that all parties were "in agreement that *no other labor organization* . . . [*had*] *made a claim for this work.*" Under the circumstances, the Court found that the union was simply engaged in an economic strike and that there was not "reasonable cause" to believe there was a violation of § 8(b)(4)(D). We believe, *arguendo*, that this conclusion was in error even under the facts of that case; *but whether it was erroneous or not, it is not applicable to the instant case. For here, unlike Penello, another labor organization did claim the work.*

Under circumstances totally different from those present here, the N.L.R.B. has found in various cases cited in the Petition, pp. 21-22, that there was no "dispute" to determine under § 10(k) (e.g., picketing to protest an employer's termination of the bargaining agreement and unilateral reassignment of driving work from one geographical area to another, with *no* claim by the favored union, *Teamsters' Union (Safeway Stores)*, 134 N.L.R.B. 1320 (1961); and picketing to force work reassignment in the absence of *any* claim by the incumbent union, *Lathers Union (Acoustics and Specialties, Inc.)*, 139 N.L.R.B. 598, 599 (1962)). *The Board has rendered no such decision, however, in any case similar to the one at bar*, and in none of the cited cases was there a claim by an incumbent union similar to that of the Millwrights.[5]

---

5. The Board and courts continue to find a violation of § 8(b)(4)(D) when a union pickets to obtain work which is being performed by unorganized employees, despite the absence of "claims" in the usual sense or "strike threats" from the unrepresented employees. See, e.g., *Vincent (Marshall Maintenance) v. Pipefitters Local 39*, 288 F.2d 276 (2d Cir. 1961); and *Pipefitters Local 798 (Moon Pipeline)*, 177 N.L.R.B. No. 62, 71 LRRM 1392 (1969). Such holdings recognize the *employer's* right to protection under § 8(b)(4)(D) and place substance above form.

For obvious reasons, the broad dictum in *CBS* and *Penello* has lent itself to ingenious but disingenuous defenses by unions accused of violating § 8(b)(4)(D).

Thus, unions have argued in various cases that particular acts of picketing for work assignments were not unlawful because there was only a dispute between the picketing union and the employer. Such arguments have in some cases been based on the silence of the incumbent union which was already doing the work. In others, where the incumbent union had nothing to lose even if the employer gave in to the demands of the picketing union, the incumbent helpfully came forward and "disclaimed" the work. The Labor Board and courts have rightfully rejected such defenses as mere dodges which would defeat the obvious purpose of § 8(b)(4)(D), have refused to accept the narrow construction of § 8(b)(4)(D) which Petitioner would read into *Penello*, and have uniformly found picketing unlawful under circumstances similar or analogous to this case. See, for example, the following cases:

N.L.R.B. (Sarrow-Suburban Electric) v. IBEW Local 25, 383 F.2d 449 (2d Cir. 1967);

N.L.R.B. (Pocahontas Steamship) v. ILA Local 1291, 368 F.2d 107 (3d Cir. 1966), affirming 152 N.L.R.B. 676, cert. den. 386 U.S. 1033;

Carpenters v. Montag & Sons, 335 F.2d 216 (9th Cir. 1964), cert. den. 379 U.S. 999;

Carpenters Local 978 v. Markwell, 305 F.2d 38 (8th Cir. 1962);

Cueno v. Operating Engineers Local 825, 300 F.2d 832 (3d Cir. 1962);

Vincent (Marshall Maintenance) v. Pipefitters Local 395, 288 F.2d 276 (2d Cir. 1961);

Operating Engineers Local 520 (Biebel Bros., Inc.), 170 N.L.R.B. No. 38, 67 LRRM 1500 (1968);

Cement Masons Local 524 (Tobasco Prestressed Concrete Co.), 163 N.L.R.B. No. 75 (1967);

Millwrights Local 1113 (Brogdex Co.), 157 N.L.R.B. 996 (1966);

Bricklayers Local 2 (Decora, Inc.), 152 N.L.R.B. 278 (1965);

IBEW Local 639 (Bendix Radio Division), 138 N.L.R.B. 689 (1962).

In *Markwell, supra,* 305 F.2d at 47, the Eight Circuit flatly rejected the union's argument that its picketing was lawful because its only dispute was with the employer, commenting:

"Appellants also contend that the facts here do not establish a true 'jurisdictional dispute.' While §158(b)(4)(D) and its counterpart §187(a)(4) are of particular aid in disputes involving two rival unions within an employer organization *it is clear that these sections are also applicable when the dispute might be said to be solely between an employer and a union.* See Longshoremen, etc. v. Juneau Spruce Corp., 342 U.S. 237, 72 S.Ct. 235, 96 L.Ed. 275, 29 LRRM 2249; Vincent v. Steamfitters Local Union 395, etc., 2 Cir., 288 F.2d 276; 47 LRRM 2695; and Note, 64 Harv. L.R. 781, 806 and cases cited, f.n. 192 at p. 806."

In *Pocahontas Steamship, supra,* 368 F.2d 107, the dispute involved the work of opening and closing hatches aboard the employer's ships. The hatches were opened and closed by turning an electrical switch, an operation which took one man approximately one-half hour during the course of loading or unloading a ship. It was the custom of the employer, Pocahontas, to assign such work to its ships' crews, represented by the National Maritime

Union (NMU). In Philadelphia, site of the dispute, it was customary in the industry to assign the work of opening and closing hatches to a crew of six men and a foreman belonging to the International Longshoremen's Association (ILA). Pocahontas refused to hire such a crew and was picketed by the ILA. After Pocahontas filed charges with the N.L.R.B. claiming a violation of § 8(b)(4)(D), the NMU wrote a "disclaimer" letter to the Board *advising it that the NMU made no claim to the work involved.* The Board nevertheless petitioned for and obtained an injunction from the District Court. The Board ultimately held that, *notwithstanding the NMU disclaimer,* the ILA had violated the Act. In so holding, the Board observed that NMU's purported "disclaimer" involved no sacrifice on its part since its members—*like the Millwrights in the case at bar*—would not be laid off, would lose no time and would receive the same compensation *regardless of whether they performed the minor tasks of actuating the hatch covers.*

In affirming the Board's decision, the Third Circuit stated:

> "From a workman's point of view, the valuable part of a right to a particular job is the right to be paid for it. Thus, a jurisdictional dispute between two groups of employees as to which is entitled to certain work is in essence a dispute as to which shall receive compensation for that work. The opportunity sought to perform labor is significant only as a means of obtaining compensation. It follows that *if workmen, who are entitled to a job under the terms of a labor contract, agree to forego the obligation of working but not the concomitant right to payment, they have not disclaimed any significant right.* When,

> as in this case, one group insists that work, for which another group has contracted and is being paid, be assigned it, *the fact that both groups are claiming pay for the same work suffices to create a jurisdictional dispute, and it is irrelevant that either group, or both, may manifest a willingness to take the pay and forego the work.* See International Brotherhood of Carpenters and Joiners of America (AFL-CIO) v. C. J. Montag & Sons, Inc., 9th Cir. 1964, 335 F.2d 216, 221, 56 LRRM 2755. Contrast Penello for and on Behalf of N.L.R.B. v. Local 59, Sheet Metal Workers International Assn., D. Del. 1961, 195 F. Supp. 458, 48 LRRM 2495, where the union to which an employer proposed to assign work had no contractual right to the work and was not claiming work or attendant pay."[6]

This Court denied certiorari, 386 U.S. 1033.

In *Montag & Sons, supra*, 335 F.2d 216, Montag was engaged in the construction of a dam. Carpenters Local 1849 had a collective bargaining contract with Montag covering carpenter work on the project. Soon after work began, a controversy between Montag and the Carpenters arose concerning the rigging of certain forms used in the pouring of concrete. Montag had assigned the work of rigging these particular forms to members of the Ironworkers Union. The Carpenters caused work stoppages on the project several times by refusing to work or handle wooden frames after they had been rigged by the Ironworkers. Montag brought suit in the District Court under § 303 for damages resulting from the work stoppages. The Carpenters took the position that no jurisdictional dispute existed between them and the Ironworkers

6. The Court did not find, as stated in the Petition, p. 25, that the incumbent union's "claim was nonetheless vigorous." As did the Board, the Court found a *disclaimer*, not a claim, by the incumbent.

because it had agreed with the Ironworkers that the Carpenters would handle the wooden forms and the Ironworkers would handle everything else. However, the Ironworkers would not agree to composite crews, thus requiring duplicate crews for those cranes which were handling both wooden and metal forms. Montag refused to put this union agreement into effect.

The Ninth Circuit upheld an award of damages. It rejected the contention that § 8(b)(4)(D) had not been violated because there was no "jurisdictional dispute" between two unions, commenting in part as follows:

> ". . . The appellants urge that the statute must not be read literally, that it was intended to apply only to such jurisdictional disputes as involved an active controversy between two unions, the employer being the helpless victim over whose prostrate business the battle was being fought. The appellants say that in this case there was no active controversy between the Carpenters and the Iron Workers; that the Carpenters were merely making a lawful demand upon Montag, and using lawful economic force to obtain what they demanded.
>
> "Montag and the other appellees reply that the statute may not be read as if it contained a requirement that there be an active dispute between two unions but that, if the statute must be so read, the requirement is fulfilled by the facts of this case. We agree with the appellees' alternative contention that there was in fact an active dispute between two unions, and therefore find it unnecessary to explore their argument for a literal reading of the statute. This case does not resemble at all the case of *Penello v. Sheet Metal Workers Union*, 195 F. Supp. 458 (D.C. Del.), upon the excellent opinion in which the appellants rely heavily.

"We here take note of the Supreme Court's recognition that the draftsmen of the Taft-Hartley Act regarded jurisdictional disputes as a great evil and were bent upon doing all that could be done to cure that evil. . . . This recognition by the Supreme Court that the mood of Congress was that jurisdictional disputes are intolerable is significant, and teaches us that the damage suit provisions which Congress inserted in the law at the same time that it wrote the above cited provisions for an administrative remedy should not be given a narrow interpretation.

* * *

"We now consider whether there was a jurisdictional dispute between the Carpenters and the Iron Workers for the work of rigging the wooden forms. As we have seen, Montag, as early as April, 1957, assigned the work to the Iron Workers. It persisted in that assignment throughout the two year period of performance of the contract. The Iron Workers, therefore, had no occasion to complain or to strike about the assignment. They had the jobs. Their national union and the Carpenters' union both being members of the AFL-CIO federation, it was natural that their national officers should engage in friendly discussion with the national officers of the Carpenters. All responsible union officials are aware that jurisdictional disputes and feather-bedding are in bad repute, and they try to avoid putting friendly allied unions in the position of engaging in these tactics.

* * *

"The foregoing narration of events giving rise to these suits seems to us to portray a typical case easily within the purpose of the Taft-Hartley Act's provisions concerning jurisdictional disputes. *The fact that one union has the jobs and holds on to them in a polite, non-belligerent manner* while the other union uses the forbidden tactics in an effort to get

them or get some of them, *does not mean that what Congress regarded as the evils of a jurisdictional dispute are not present. And the fact that the union which has lost the job is not unwilling that the other union should come in and do some of the work and get paid for doing it, if the first union will still continue to get paid for the work, does not remove the situation from the category of jurisdictional disputes.*

"On this phase of the case our conclusion is that the District Court was right in finding that Carpenters Local 1849 had violated § 303(a)(4), 29 U.S. Code 187(a)(4) and in giving the appellees in case No. 18,875 a judgment for its damages. . . ."

This Court denied certiorari, 379 U.S. 999.

Petitioner has not, and cannot, cite a single case under § 303 that has been dismissed because there were no "competing claims."

In *Juneau Spruce*, there was no strike threat by the incumbent union, whose members honored the picket line—thus no "genuine jurisdictional dispute" in the sense of Petitioner's argument—yet this Court found a violation.

In *Pocahontas* and *Montag*, the Third and Ninth Circuits found liability under § 303 despite the absence of a strike threat or, in *Pocahontas*, even an express claim by the incumbent union.

There is nothing new or novel involved in the Fifth Circuit's decision; it correctly applies established precedent to the facts of this case. It clearly presents no question warranting the granting of certiorari.

Although not articulated in the same manner in each case, the rationale for *Juneau*, *Pocahontas* and *Montag*

seems to be that § 8(b)(4)(D) exists for the protection of employers as well as incumbent unions, that an employer's right to a remedy in a case such as this should not be contingent upon the precise manner in which, or vigor with which, the incumbent union defends the assignment with which it has been favored, and that an employer in the circumstances of this case is caught, as squarely as was *CBS*, "between the devil and deep blue." *Radio Engineers Union*, 364 U.S. at 575.

Here, as in *Juneau*, *Pocahontas* and *Montag*, the employer was faced with the demands of an outside union on the one hand, and, on the other, with the established status of an incumbent union—a union which was secure in the knowledge that it only needed to assert its claim and sit tight in order to keep the work. "That competition for work at the expense of employers has been condemned by the Act." *Juneau Spruce*, 342 U.S. at 245.

CONCLUSION

Jurisdictional strikes have plagued the construction industry for years, despite continuing efforts by management and labor to improve and encourage the use of available peaceful means of settlement. Petitioner's proposed interpretation of § 8(b)(4)(D) and § 303 would seriously weaken the deterrent value of damage actions under the Act and thus dampen the hope that a better solution than the jurisdictional strike can be found for the industry.

For all the reasons discussed above, the Petition should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I certify that a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was mailed to Mr. W. Arthur Combs, Attorney for Petitioner, 1220 Americana Building, Houston, Texas 77002, on this 13th day of October, 1970.

Tom M. Davis

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 618

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 450, AFL-CIO,
Petitioner,

v.

CONSTRUCTION EMPLOYERS' ASSOCIATION OF TEXAS, ET AL,
Respondents.

PETITIONER'S REPLY BRIEF

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Respondents.

PETITIONER'S REPLY BRIEF

COMES NOW Petitioner, International Union of Operating Engineers, Local 450,

AFL-CIO, and files this reply brief for the purpose of specifically pointing out that counsel for Respondent has based its argument on a factually incorrect premise, namely, that the trial judge found that the Millwrights claimed[1] the work in question and that there was, therefore, a jurisdictional dispute.

The Trial Court's findings regarding the Millwrights' purported "claim" were as follows:

> "One of the factual disputes in this case has to do with whether or not the Millwrights were claiming the right to operate the crane. Evidence before the Court shows clearly that the Millwrights complained to Ashley-Hickham when iron workers were allowed to operate the crane.

[1] All emphasis in this brief has been supplied by the writer unless otherwise indicated.

Shortly before the commencement of the job in question, Mr. Ashley inquired of Jack O. Fountain, who at that time was the business representative of Millwrights Local 2232, what would happen if the Operating Engineers took action to demand the operation of the crane, and Fountain informed Ashley that if that time ever came they would find a way to claim the work.

There is no question that Fountain had told officials of Operating Engineers that the Millwrights were claiming the right to operate the crane as a tool of their trade.

Fountain explained the action of the Millwrights by explaining that they knew that the operation of the crane belonged to the Operating Engineers, but that they many times made such claims so as to get concessions from other unions on other matters.

From all the evidence, a finding that the Millwrights were claiming the right to operate

the crane in question can be made.

The paramount question, however, is whether the claim being made by the Millwrights was of such a nature as to make it a bona fide jurisdictional dispute between the Millwrights and the Operating Engineers.

If one reads Section 8(b)(4)(D) by itself, there is no question but that Plaintiffs could recover in this case. However, a reading of the Act, and especially its amendments of 1947, shows clearly that Section 8(b)(4)(D) of the Act was not what it would seem to be, reading it apart from the rest of the Act, for at the same time that Section 8(b)(4)(D) was passed, Congress also passed Section 10(k), 29 U.S.C.A. Section 160(k), which provided for the National Labor Relations Board to settle jurisdictional disputes.

* * *

The amendments to the Act of 1947, and especially Sections 8(b)(4)(D) and 10(k) of the Act,

were devised to prevent an employer from being caught in the middle of a genuine jurisdictional dispute between two groups of employees, union or not.

The Taft-Hartley Act itself and the proceedings in Congress during its amendment in 1947 shows clearly that the right of unions to picket was not to be lightly taken away because of the Act or its amendments.

There is no evidence in this case that the Millwrights ever told Ashley-Hickham that if the Operating Engineers were given the job of operating the crane, they themselves would strike. In fact, it is abundantly clear that the Millwrights honored the picket of the Operating Engineers.

* * *

I find, therefore, that under the Act, the protection and claim for damages by an employer under Section 8(b)(4)(D) can only be resorted to in a genuine jurisdictional dispute where two sides of employers

> inform the employer that they will strike if the work is given to the other, or the employer is under contract to assign the work to a particular group. In other words, Section 8(b)(4)(D) of the Act cannot be read literally. If it could, there is no question but that the Plaintiffs in this case would have a good cause of action and would prevail."

It is to be noted that the District Court did not find that the Millwrights claimed the work; but merely said that "a finding that the Millwrights were claiming the right to operate the crane in question can be made." What the District Court did find was that the claim being made by the Millwrights was not of such a nature as to make a bona fide jurisdictional dispute between the Millwrights and the Operating Engineers.

Even if the District Court fell into error in requiring a threat to strike for a violation to exist, the holding was nevertheless correct because the Millwrights did not make an active competitive claim for the work, they simply acquiesed in the plum which the employer had granted them and admittedly knew that the work in question did not rightfully belong to them. Such a "claim" to the work does not constitute a genuine jurisdictional dispute. If this Honorable Court will review the record, it will be apparent that the evidence in this case shows no more than that the Millwrights merely accepted the work and were not willing or even interested in waging a fight

to hold on to it. Ashley-Hickham originally assigned the operation of the crane to the Millwrights for economic reasons (as found by the Trial Court). Please consider this colloquy between Mr. Combs and Mr. Fountain, Business Representative of the Millwrights:

Q. State whether or not you ever told Mr. Ashley that it was not your work and you were not claiming it?

A. Confidentially, Mr. Ashley had been in the turbin business much longer than I had, and he was always trying to figure more ways economically to operate and he knew that the work wasn't any more--the Millwright's work on a turbin job--than it was on a cement plant.

* * *

Q. Well, Mr. Fountain, I would like to ask you this question: If you were not claiming the work, why did your men do it?

A. Because they were assigned the work. They were told to do the work.

Q. Who told them to do the work?

A. Mr. Ashley's supervisor." (App.173-175).

Fountain told the Engineers' Business Agent that on this job "he was going along with Ashley" and doing the work. (App. 125-126).

In its Brief before this Court, Respondent quotes the following testimony:

> "Engineer Business Manager, McMahon admitted that in the past his union had on some occasions permitted other Unions to operate pendant controlled cranes for short periods of time, and that he knew Fountain had told Koch that the Millwrights 'were not claiming the work, but it had been assigned to them and somebody had to do the work.' (App. 160-162)."

Thus it is evident from the above testimony and from all the testimony recited in Respondent's brief, that the Millwrights simply continued to do the work because that was Ashley-Hickham's desire. The Millwrights had nothing to lose--they knew the work did not belong to them; but, they were protected, because the only effective weapon the Engineers could use was the picket, and, once they endeavored to enforce their claim in this manner, the employer has the more powerful Section 303 remedy available to him as a deterrent. In this situation, the Union is deprived of its lawful right to picket and the employer is given a far more comprehensive protection than the drafters of Sections

8(b)(4)(D) and 303 ever in their wildest imagination contemplated.

Further, Petitioner has not, as Respondents contend, couched in vague and shifting terms its descriptions of what constitutes a "genuine" jurisdictional dispute. No rules have ever specifically stated what constitutes a sufficient dispute for a violation of Section 303 to occur, or whether a jurisdictional dispute is a necessary prerequisite to a cause of action based on Section 303. Petitioner submits that the key to determining whether or not a violation of Section 8(b)(4)(D) has occurred is whether the employer has been caught in the dilema contemplated by the statute through no fault of his

own.

The Act outlaws "jurisdictional disputes". A "jurisdictional dispute" arises where the employer has been placed in a situation where he finds it impossible to secure the benefits of stability, not because he refuses to satisfy the unions, but because the situation is such that he cannot satisfy either of them. It was not disputes between an employer and a union that Congress was attempting to outlaw by the passage of Section 8(b)(4)(D), but the cross-fire of an employer being caught between two competing unions. Absent such cross-fire, the dispute is economic rather than jurisdictional.

In Juneau Spruce, Pocahontas and

Montag, the decisions in which Respondents rely heavily upon, there existed an open conflict between two unions.

Petitioner submits that the evidence in the case before this Court does not demonstrate any such conflict as was found in those cases. The facts in the instant case exhibit purely and simply a dispute between the employer, who assigned the work to the Millwrights for economic reasons, and the Engineers. This kind of "dispute" is not of the nature of a jurisdictional dispute within the meaning of Section 8(b)(4)(D).

WHEREFORE, Premises Considered, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted and that this Honorable

Court take jurisdiction and hear the case. In this connection, Petitioner reiterates that the question involved is of such importance and the decisions of the lower courts cloak the question in such ambiguity that this Court should hear the case and write an opinion, if for no other reason than to clarify and define the law applicable to this state of facts.

Respectfully submitted,

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petitioner's Reply Brief was mailed to Mr. V. Reagan Burch of Baker, Botts, Shepherd & Coates, Attorneys for Respondents, 1600 Esperson Building, Houston, Texas, on this 23rd day of October, 1970.

W. ARTHUR COMBS

Supreme Court, U.S.
FILED
DEC 16 1970
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 618

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 450, AFL-CIO,
Petitioner,

v.

CONSTRUCTION EMPLOYERS' ASSOCIATION OF TEXAS, ET AL,
Respondents.

PETITIONER'S MOTION FOR REHEARING

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PETITIONER'S MOTION FOR REHEARING

COMES NOW Petitioner, International Union of Operating Engineers, Local 450, AFL-CIO, and files this Motion for Rehearing; and as grounds for same would

respectfully show this Honorable Court that the National Labor Relations Board ruled on November 25, 1970, under circumstances very similar to those in the case at bar, that there was no jurisdictional "dispute" to be determined in a proceeding under Section 10(k) of the National Labor Relations Act, as amended. Because Petitioner feels that this new case will bear heavily upon final rendition of judgment in the case before this Court on this petition, it will be necessary to set the recent decision out in some detail.

In Hoisting and Portable Engineers, Local No. 450 and United Engineers and Constructors, Inc. and General Drivers Warehousemen and Helpers Local Union

No. 968, /186 N.L.R.B. No. 125 (1970)/ 75 LRRM 1424, the dispute involved the operation of a fuel truck in Texas City, Texas, where the Employer was under a contract with Union Carbide Company for the construction of new plant units and the maintenance of existing plants. The project required the use of gasoline and diesel-powered equipment. During the last four years, the Company apparently used four different fuel trucks on the Union Carbide job for the fueling on non-mobile equipment.

The original fuel truck was a flat bed truck with two tanks, one for gasoline and one for diesel, from which the fuel was dispensed with a hand pump. The driver of the truck was a member of

the Teamsters. In addition, an operator and an oiler, members of the Operating Engineers, alternated on the tasks of pumping fuel, holding and directing the hose and checking oil and water.

In February, 1967, the original flat bed truck was replaced by a metal enclosed truck with two tanks from which gasoline and diesel fuel were dispensed by a power take-off or lever located on the instrument panel in the driver's cab of the truck. The Employer assigned all functions, including driving, control of the power take-off and dispensing of the fuel to a two-man crew consisting of an operator and an oiler, both members of Operating Engineers, who performed these duties interchangeably. In 1968

the Employer reverted to use of the same type of vehicle as the original flat-bed truck and employed a three-man crew whose duties and union affiliation were like those of the 1966 crew.

Sometime in early 1970 the Employer decided to replace this truck with a flatbed truck which, like the 1967 truck, had a mechanized pumping device. The Employer made an assignment covering the operation of the new fuel truck which provided for the driving of the same by a Teamster and for the fueling operation to be handled by an operator (member of Petitioner). This case had its origin in the failure of the Employer to also assign an oiler to help the operator, as provided in the Working Agreement between

Petitioner and the Company.

On the morning of March 19, 1970, the Employer commenced using this truck in accordance with its new assignment. Engineers refused to man the operation without an Oiler and on March 24, 1970, the company filed a charge against Petitioner alleging that it violated Section 8(b)(4)(D) of the Act by engaging in a work stoppage in protest of the Company's assignment of the fuel truck to Teamsters rather than to Engineers. The Regional Officer concluded that both Teamsters and Engineers were claiming the work of operating the fuel truck in question and ordered a 10(k) hearing, which hearing was conducted on May 5, 1970.

Petitioner moved that the notice

of hearing be quashed on the ground that there was no jurisdictional dispute between it and the Teamsters. At the hearing, both unions formally disclaimed on the record any interest or right to the work claimed by the other with respect to the operation of the fuel truck. The Operating Engineers asserted that it did not oppose the assignment of the driving and control of the fuel power take-off to a member of the Teamsters. The Teamsters agreed that it had no objection to the presence of a second member of the Engineers, so long as one Teamster remained on the job.

To make the position taken by the unions at the hearing crystal clear, Petitioner quotes as follows from the

transcript of the record in that case:

"HEARING OFFICER: May we have a brief statement, then from the Teamsters, please.

MR. WATSON (Attorney for Teamsters): Very briefly, Mr. Hearing Officer, it was my impression that there is no dispute between the two unions. I gather Mr. Clinton feels it's to his advantage to have a dispute between the two unions, and so he has interjected something toward that end. At least that is my impression of what his position is.

But in any event, with regard to the facts on this particular case, and this particular truck, the Teamsters Union is perfectly willing to abide by the status quo arrangement as it relates to the work in dispute. The work in dispute, as I understand it, and in line with the Hearing officer's statement earlier, is the operation of two small knobs on the dashboard of the truck which activate fuel pumps.

The status quo with regard to that work is that it's now being done by the Teamster driver. The

practicalities are that it almost has to be that way because the driver has to push in the clutch to activate the pumps.

In that sense, it appears to me that there is no dispute. Apparently there is a question of whether or not a third man should be put on the truck. I don't gather that the Operating Engineers are claiming that a third man should be put on the truck to operate those two knobs. I don't know what they do want the third man to do. But that does not appear to me to be in issue in this proceeding, whether or not a third man is to be added.

We have no objection if the company wants to put a third man on there. It's fine with us.

So briefly stated, it doesn't appear to me that there is a jurisdictional dispute with respect to the particular work in issue, or at all." (TR 21-22)

The Hearing Officer then requested the attorney for Engineers to state the Engineers' position, whereupon Mr. Combs

said as follows:

> "That is our basic position, your Honor, but in this particular hearing I am willing to -- I agree thoroughly with the statement made by Mr. Watson. If the operation of the truck be understood to include the operation of these two levers, then we still go along with him and say we do not claim the right to operate the truck, including the two levers. So, therefore, there is no controversy between the two unions as to the operation of the truck (TR.23)" (Emphasis supplied).

It was thus made abundantly clear to the National Labor Relations Board that there was no conflict whatever between the two unions and that, therefore, there was no jurisdictional "dispute" between them, the only dispute being between Engineers and the Company over whether an oiler should also have been assigned to assist the operator

in performing the fueling operation.

The Hearing Examiner ruled, and the Board affirmed, as follows:

> "There is no substantial evidence that two competing groups of employees are contending for the work described above. Thus, the Operating Engineers has explicitly disclaimed any interest in the work assigned to the driver-member of Teamsters, and the latter organization has not claimed the work assigned to the engineer-member of the Operating Engineers.
>
> As noted above, the Employer argued that all work on the fuel truck should be under the exclusive jurisdiction of the Teamsters, and the Operating Engineers pressed the employer to restore the position of oiler. We find that these opposing claims were essentially disputes between the Employer and the Operating Engineers.
>
> The Board has repeatedly held that Sections 8(b)(4)(D) and 10(k) of the Act were intended to deal with disputes between two or more competing employee groups claiming the right to perform certain tasks, and not as here, with disputes

> between a union and an employer where no such competing claims between rival groups of employees are involved.
>
> Accordingly, we find that there is herein no jurisdictional dispute within the meaning of Section 8(b)(4)(D) and Section 10(k) of the Act. We shall therefore quash the notice of hearing."

Petitioner anticipates that Respondent will contend that the case discussed above is not applicable to the instant case because it was not a damage action under Section 303 but a Section 10(k) hearing. As said by this Honorable Court in Longshoremen's Union v. Juneau Spruce Corp., 342 U.S. 237 (1952): "Section 8(b)(4)(D) and Section 303(a)(4) are substantially identical in the conduct condemned." Thus it is evident that a finding of an underlying Section 8(b)(4)(D)

jurisdictional "dispute" is a necessary prerequisite for either Section 10(k) hearing or a Section 303 damage suit.

In the case at bar the Millwrights specifically disclaimed any jurisdictional "dispute" with the Engineers, just as the Teamsters in the Hoisting and Portable Engineers case specifically disclaimed any jurisdictional dispute with Petitioner. This is evident from the testimony of Jack O. Fountain, Business Representative of Millwrights Local Union 2232:

> "Mr. Combs: I will ask you this: Did the Millwrights, either through you or anybody else, make a claim that the operation of those cranes in connection with that overhaul job was work that belonged to the Millwrights?
>
> Mr. Fountain: On this specific job, no sir. We did not tell

anybody, that I can recall, that definitely that was the work of the Millwrights."

* * *

"Mr. Combs: Did you ever say to Mr. Ashley that the Millwrights claim the work and that it belongs to Millwrights? And by that, I'm talking about the operation of the overhead crane.

Mr. Fountain: Mr. Combs, let me answer this way: In discussion with Ashley, I would say at different times that we had figured out ways and arguments that we might could argue that this work was Millwrights, yes, sir. <u>But truthfully, I don't think that he believed that the work was actually the work of the Millwrights.</u>

The Court: Well, you were sure trying to find a way to claim that it was such, weren't you?

Mr. Fountain: <u>No, sir, I didn't place any claim on that work.</u>

The Court: Well, you told Mr. Ashley, 'We'll cross that bridge when we get to it.' and you told him you were looking for a way to

claim it for the Millwrights.

Mr. Fountain: No Sir, I said at many times in discussion with Mr. Ashley we had discussed different ways that we might could claim the work.

The Court: Oh, you might claim it?

Mr. Fountain: Yes, sir.

The Court: All right. You just want to add the word 'might'? Put 'might'.

Mr. Fountain: I put 'might' in the first time, sir.

The Court: All right.

Mr. Combs: Did you ever make claim to it?

Mr. Fountain: You mean on this specific job?

Mr. Combs: Yes, sir.

Mr. Fountain: I don't recall making claim to this specific job, not that I can recall, Mr. Combs.

Mr. Combs: State whether or not you ever told Mr. Ashley that it

was not your work and you were not claiming it?

Mr. Fountain: Confidentially, Mr. Ashley had been in the turbine business much longer than I had, and he was always trying to figure out more ways economically to operate and he knew that the work wasn't any more--the millwrights' work on a turbine job--than it was on a cement plant.

Mr. Burch: Excuse me. I want to object to the witness' statement as to what Mr. Ashley knew and ask that it be stricken from the record.

The Court: Sustained. It may be removed.

Mr. Combs: Well, Mr. Fountain, I would like to ask you this question: If you were not claiming the work, why did your men do it?

Mr. Fountain: Because they were assigned the work. They were told to do the work.

Mr. Combs: Who told them to do the work?

Mr. Fountain: Mr. Ashley's supervision." (App. 173-175).

Ashley Hickham originally assigned the operation of the crane to the Millwrights for economic reasons (as found by Trial Court). The facts in the instant case exhibit purely and simply a dispute between the employer, who assigned the work to the Millwrights for economic reasons, and the Engineers. This kind of "dispute" is not of the nature of a jurisdictional dispute within the meaning of Section 8(b)(4)(D).

WHEREFORE, Premises Considered, Petitioner respectfully submits that this Honorable Court should grant this Motion for Rehearing and grant Petitioner's Petition for Writ of Certiorari and that this Honorable Court take jurisdiction and hear the case. At the risk of vio-

lating the Rules, Petitioner repeats that the question involved herein is of such importance and the decisions of the lower courts cloak the question in such ambiguity that this Court should hear the case and write an opinion, if for no other reason than to clarify and define the law applicable to this state of facts.

Respectfully submitted,

W. ARTHUR COMBS
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Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petitioner's Motion for Rehearing was mailed to Mr. V. Reagan Burch of Baker, Botts, Shepherd & Coates, Attorneys for Respondents, 1600 Esperson Building, Houston, Texas, on this 10 day of December, 1970.

W. ARTHUR COMBS

CERTIFICATE OF COUNSEL

I, _____,

Attorney for Petitioner, International Union of Operating Engineers, Local 450, AFL-CIO, do hereby certify that this Motion for Rehearing is filed in good faith and not for delay and that same

is filed for the purpose of bringing to the Court's attention a recent case which, in the opinion of counsel, is controlling of the case at bar.

W. ARTHUR COMBS